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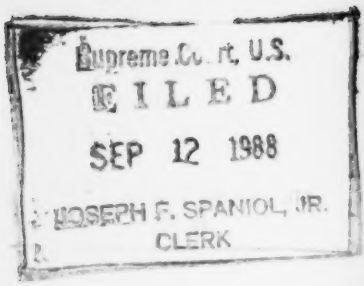

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD DUDOSH, Administrator of the Estate of Kathleen Dudosh,

Petitioner

versus

DANIEL WARG, DEAN SCHWARTZ, and CITY OF ALLENTOWN,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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16PP-

I. WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF CONSTITUTIONAL LAW BY ACCEPTING THE RESPONDENTS' PRETEXTUAL ARGUMENT OF KNOWN INTRUDERS VERSUS UNKNOWN INTRUDER WHERE PETITIONER'S CHARACTERIZATION OF THE SEX DISCRIMINATION WAS TWOFOLD:

A) THE INDIVIDUAL OFFICERS FAILED TO GIVE THE DECEDENT SAFE PROTECTION THEY WOULD HAVE PROVIDED A MALE FACED WITH A FORCED ENTRY INTO HIS HOME MERELY BECAUSE SHE WAS A WOMAN; AND

B) BECAUSE THIS WAS A DOMESTIC CASE WITH A WOMAN THE VICTIM, THE POLICE DID NOT PROVIDE THE DECEDENT WITH THE HIGH DEGREE OF PROTECTION THAT THEY WOULD HAVE PROVIDED A NON-DOMESTIC CASE WHERE A VIOLENT PERSON FORCIBLY BROKE INTO A PRIVATE RESIDENCE?

II. WHETHER OR NOT THE PETITIONER'S CLAIM OF SEX DISCRIMINATION AGAINST PLAINTIFF'S DECEDENT BY THE INDIVIDUAL DEFENDANTS IS NOT SUSCEPTIBLE TO THE DEFENSE OF "QUALIFIED IMMUNITY" BECAUSE THE LAW HAS BEEN "CLEARLY ESTABLISHED" THAT POLICEMEN MAY NOT DISCRIMINATE AGAINST WOMEN IN PROVIDING ADEQUATE PROTECTION MERELY BECAUSE OF THEIR STATUS AS WOMEN, OR MERELY BECAUSE THE COMPLAINT ARISES FROM DOMESTIC VIOLENCE?

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NO.

EDWARD DUDOSH, Administrator of Estate of Kathleen Dudosh,

Petitioner

versus

DANIEL WARG, DEAN SCHWARTZ and CITY OF ALLENTOWN,

Respondents

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Edward Dudosh, Administrator of Estate of Kathleen Dudosh, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals For The Third Circuit.

OPINIONS BELOW

The Order of the U.S. Court of Appeals For The Third Circuit, rendered 7/12/88 is unrecorded and appears at page 41 of the Appendix herein. The Order of the U.S. Court of Appeals For The Third Circuit

page 69 of the Appendix herein.

The Order of U.S. District Court For the Eastern District of Pennsylvania rendered 5/18/87 is recorded at 665 F.Supp. 381 (E.D., Pa. 1987) and appears at page 112 of Appendix herein.

The final Order of the U.S. Court Of Appeals For The Third Circuit was dated 7/12/88 and the Petition For Writ of Certiorari is timely filed within ninety (90) days thereof. The Jurisdiction of the Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

A) Procedural History of Case

The Plaintiff/Petitioner filed claims under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment against Defendants/Respondents, City of Allentown and two of its police officers after Petitioner's Decedent was killed by a shotgun blast at the entrance to her residence while she was being escorted to the door by the two police officers.

The Due Process claims were two-fold: 1) where Decedent was in protective legal custody of the police by virtue of a court order and the police use Decedent's body to test a known danger, Decedent's estate has a claim under Due Process Clause of the 14th Amendment that Decedent's constitutional right to bodily security was violated by the police officers; and 2) the claim that Decedent lost her life as a result of gross negligence of City of Allentown in training its police officers in the handling of

actionable under the Due Process Clause of the 14th Amendment.

The Equal Protection claims were two-fold: 1) the police officers and City discriminated against Petitioner's Decedent because they would have provided a male faced with a forcible entry into his home with a higher degree of protection; and 2) the police officers and City discriminated against Petitioner's Decedent because of the nature of her complaint, namely because it was a domestic violence complaint, the police officers and City did not provide her with the high degree of protection they would have provided in a non-domestic case where a violent person forcibly breaks into a private residence.

In a Memorandum and Opinion of May 18, 1987, the trial court denied Defendant's Motion For Summary Judgment on Plaintiff's Equal Protection Claims, but granted summary judgment in favor of Defendants and against

cited above. Plaintiff timely requested that the Court either reconsider its decision of 5/18/87 on Plaintiff's Due Process claims, or alternatively, certify the Due Process claims under 28 U.S.C. Section 1292(b) for review by United States Court of Appeals. After Plaintiff requested reconsideration or certification, Defendants filed a similar request asking for reconsideration on the Equal Protection claims or certification of the Equal Protection claims under 28 U.S.C. Section 1292(b).

On 8/6/87, the Trial Court denied all requests for reconsideration, and certification, but indicated that IF Defendants filed an appeal to U.S. Court of Appeals on the question of qualified immunity, it would reconsider on its own initiative the issue of certification under 28 U.S.C. Section 1292(b).

Defendants duly filed an appeal to U.S. Court of Appeals on the limited question of qualified immunity. On 8/28/87, the trial

under 28 U.S.C. Section 1292(b) only, the question of Plaintiff's Due Process claims under the 14th Amendment. Plaintiff timely sought permission to file an appeal in the nature of a cross-appeal on the granting, in part, of Defendant's Motion For Summary Judgment. insofar as Plaintiff's two Due Process claims were stricken. On October 6, 1987, U.S. Court of Appeals, 3d Circuit, per Weis, J. and Stapleton, J. denied Plaintiff's Petition For Permission To Appeal. On June 16, 1988, the Court of Appeals, 3d Circuit entered an Order and Opinion dismissin Defendant, City's appeal, vacating District Court's denial of summary judgment of Defendant's Warg & Schwartz, and remanding for further proceedings on individual Defendant's claim of qualified immunity.

In the Opinion of June 16, 1988, Court of appeals, per Stapleton, J. wrote as follows:

> "Since we think that this appeal presents serious issues regarding entitlement to qualified immunity and that defendants should not be prejudiced by the generality of Plaintiff's pleadings, we chose in this

> plaintiff's equal protection claim. There, the plaintiff assets that the City had a policy of discriminating between intruder cases in which the person calling for help does not know the intruder (e.g., burglary cases) and intruder cases in which the person soliciting aid does know the intruder (e.g., so-called 'domestic cases). In the former class of cases, the appropriate response is allegedly dictated by department policy and includes a requirement that a caller who is not on the premises be kept away from the premises until the intruder is removed. In the latter class of cases, it is the policy that the appropriate response is left up to the discretion of the officers responding to the call based upon what they find on the scene, and the department does not instruct its officers that the caller must be kept away from the premises until the intruder is gone. Obviously, this case falls in the latter class."
>
> Page 11 of Order of 6/16/88

First, these factual averments--departmental policy of keeping the victim away from an unknown intruder versus discretion of officers in instance of known intruder in domestic cases--were vigorously contested below, and the trial court properly refused to accept these disputed facts offered by Defendants.

Second, the distinction of known intruders versus unknown intruders never came from

sistently has been as follows:

> "In the case at bar, Plaintiff made two contentions relative to Equal Protection: 1) the Plaintiff's Decedent was discriminated against because of her sex by the two individual Allentown Police officers, and also by the City of Allentown because more protection would have been provided a male faced with a forced entry into his home; and 2) the police officers and the City of Allentown because of the nature of her complaint, namely, because it was a domestic violence complaint, the police officers and the City did not provide her with the high degree of protection that they would have provided a non-domestic case where a violent person forcibly broke into a private residence. The trial court expressly found that there was a genuine issue of material fact concerning these contentions, and denied Defendant's motion for summary judgment."
>
> Page 18 of Appellee's Brief To Third Circuit.

Hence, if the Court had looked to Appellee's Brief for a "more specific articulation of Plaintiff's equal protection claim", this is the articulation it would have found. The distinction for treating Plaintiff's Decedent differently on the basis of "known intruders" versus "unknown intruders" comes <u>entirely</u> from Defendant in Appellant's Brief to Third

that this distinction came from Plaintiff--and by not treating it as the pretextual distinction that it was--the Court of Appeals applied the wrong legal theory premised in disputed facts in analyzing Plaintiff's claim of sex discrimination by the individual officers for purposes of applying qualified immunity to the individual officers.

On July 12, 1988, the Court of Appeals for Third Circuit denied Plaintiff's timely Petition for Rehearing. Hence, Plaintiff/ Petitioner is now seeking review of denial of his Petition For Rehearing.

b) Statement of the facts

In July, 1984, a man named Richard P. "Tex" Miller assaulted Plaintiff's Decedent, Kathleen Dudosh, to an extent that she required hospitalization from 7/19/84 to 7/27/84. Miller again assault Plaintiff in her hospital room during her hospitalization, and that assault was duly reported to Allentown Police Department.

porary Protection From Abuse (PFA) Order from Court of Common Pleas of Lehigh County, Commonwealth of Pennsylvania pursuant to 35 PA. C.S.A. Section 10181-10190 (Purdon's Supp. 1986). The deceased, in her petition for the temporary PFA Order stated that she and Miller had resided together for approximately two and one-half years. She further alleged that on 10/10/84, Miller threatened to kill her and "anyone who got in his way"' that he had a drinking problem and had been hospitalized many times for alcohol abuse; that in October, 1984, Miler "pushed" the deceased, "hit her around", "smashed her furniture and made several threats to "kill himself and her"; that on another occasion in October 1984, Miller "beat up" the deceased two days in a row, requiring her hospitalization for two weeks, during which Miller assaulted her again; and that in August, 1984, Miller "choked her so hard that he lifted her off the ground two fee while heavily drunk".

the Allentown Police Department consistent with the requirements of the Order itself.

On October 20, 1984, at 1:30 P.M., the Allentown Police Department received a report of an "unwanted person" at the Decedent's residence. Upon the patrolman's arrival, the Decedent exhibited the temporary PFA Order she had obtained the prior day and informed the officer that Miller had appeared at her apartment door the previous night in an intoxicated state. She stated that she had allowed him to sleep there, but called the police when he did not wake up and leave. The patrolman told Miller to leave and he complied.

On November 21, and December 7, 1984, the Allentown Police were again called to Decedent's apartment. On both ccoasions, Miller was again removed from the scene without arrest.

On Dec. 9, 1984, a neighbor of Decedent

"prowler" to the Allentown Police. The patrolman who responded to the call learned upon arrival that the "subjects" reported on the fire escape resided in the building and were using the fire escape due to a "10-40" sleeping in the "breesway [sic]." The patrolman arrested the "lo-40", i.e., Tex Miller, transported him to Police Headquarters and cited him as a "public drunk".

On 1/21/85, the Lehigh County Court of Common Pleas made the temporary PFA Order a permanent Order of Court. The Order directed Miller to refrain from abusing or threatening to abuse Decedent and not go near her residence. The court further ordered that copies of the Order with Petition be served upon Allentown Police Department as well as Miller, and that if Miller violated the order he could be found in violation of the Protection From Abuse Act and/or in indirect criminal contempt of court.

On 1/24/85, at 1:49 P.M., the Deceased

at her residence with the Allentown Police. Miller was again sent on his way, but was not arrested.

On 1/25/85 at 3:58 A.M., the individual Defendant, Warg, transported Decedent to "Turning Point", a non-profit organization providing social services to abused spouses. Warg stated in his report that Decedent informed him that Miller was knocking on her door and driving around the block although Warg himself did not personally see Miller in the area.

On 1/25/85 at 9:15 A.M., Decedent filed a complaint with Allentown Police Department that Miller was following and harassing her. The reporting officer noted the PFA Order against Miller, and stated that Miller could not be located in the area.

On 1/26/85, the Allentown Police received another report of an "unwanted person" from the Deceased, who reported that Miller was at her residence harassing her. Once

locate Miller following a cursory search of the area. Later that same day, however, Miller was arrested for indirect criminal contempt pursuant to the PFA Order when he was found on the front porch of Decedent's dwelling. He was committed to the County Prison. On 3/17/85, the Allentown Police received a report of an "attempted entry" into Decedent's residence from Kathlee Dudosh. The report filed by the responding officer, Balliet, states that "[Miller] has threatened to kill the complainant and everyone that lives with her in her apartment." The reporting officer noted that Decedent possessed a PFA Order against Miller. Finally, he reported that "complainant states that she is afraid that the suspect will come back and try to make good his threats. The suspect also left a note on complainant's mail box that said (next)."

The record indicates that a copy of Balliet's 3/17/85 report was forwarded to Allentown Police Detective Bureau. The report

man's report states the following:

> "This officer did no further follow up investigation on this matter because of the above facts. It has been our policy not to get involved in matters of this nature. Usually the parties are told to bring private prosecution because most times they get back together after the incident causing the separation. This fact was verified during the investigation in incident 85-16022 on 28 March 1985, when neighbors showed that Mr. Miller has been with Miss Dudosh on a number of occasions since the abuse papers were served. On a number of occasions he had stayed with Miss Dudosh overnight."

The detective testified in his deposition he received a copy of report filed by Balliet on Sunday, 3/17/85, the following day, Monday, 3/18/85, when his shift began at 3:00 P.M. and he picked up all the reports in Detective Bureau's "bin". He stated that following Decedent's murder, his superiors asked him why he performed no follow-up work on the report filed by Balliet. The detective also explained in his deposition that the "policy" of not getting involved, referred to in his report was a policy followed by Detective

not get involved in any domestic cases...,unless there was physical abuse or physical harm naturally then like aggravated assault. Other than that, they would advise the shift, the uniform (sic) who handle any of those complaints."

On 3/28/85, Miller shot and killed Decedent and then committed suicide. The Decedent had on that date again contacted Allentown Police to request their assistance when Arlene Bell, the individual who lived in the apartment below Decedent, informed her that Miller had forcibly entered Dudosh's apartment through a locked window at the top of a fire escape on the side of the building. Individual Defendants, Schwartz & Warg, responded to Decedent's call for help. Because of her fear of Miller, Decedent had barracaded a rear window in the apartment to keephim from gaining access, but Miller broke in the apartment by tearing down the barracade. Upon their

ment building because she was afraid to confront Miller. Decedent handed Warg a copy of the PFA Order, and then police escorted Decedent up to the apartment by placing her in front of them and walking behind her. Arlene Bell testified that prior to the three ascending the stairs, Decedent asked her whether Miller was "still up there." Bell testified that she responded, "Yes, he is still up there." Additionally, in front of the two police officers, Bell warned Decedent not to go up to the apartment because she was going to be killed:

> "When Defendants Schwartz and Warg arrived: A...[Arlene Bell] said, [to Ms. Dudosh]: 'You are going to be killed...'"
> Q. Mrs. Bell, when you warned Kathleen that Tex was upstairs, I think your testimony was that the police were present when you gave her that warning.
> A. They were behind her, yes.
> Q. Were they within earshot of what you told her:
> A. Yes, as close as I am to you.
> Q. So they would have heard what you told her?
> A. Oh, yes.
> Q. And when you told Kathleen'You

A. Yes.
Q. And did the police ask you any questions?
A. No.
Q. Did they ask you why you thought that she would be killed?
A. No."

Despite this explicit warning--and mabe because of it--the police officers escorted Decedent to the apartment positioning her in front of both officers, and using her body as a protective shield.

Upon arriving at apartment entrance, Decedent unlocked the door. The door was swung open. Officer Schwartz yelled, "He has a gun". Schwartz stepped back from the doorway. Miller entered the doorway and fired a single shotgun blast into the chest of Decedent. Miller withdrew into the apartment. The individual Defendants ran down the stairway leaving Decedent bleeding on the floor. Miller at some point shortly thereafter commited suicide by firing the same shotgun he had used to kill Decedent into his own chest, but the officers at the scene never heard the

Plaintiff produced substantial evidence indicating a lack of training by City of Allentown to its police officers in handling domestic violence cases in general, and protection from abuse cases in particular:

> "We didn't know how to arrest for violations of a Court Order. We didn't know what that meant because it wasn't in the crime statute. We had a lot of problems and there was a lot of opinions on how to handle this and it was our concern because even though people would tell us the next day you should have done this or that, we are stuck with it immediately. We needed somebody to say this is the procedure the Court expects you to follow..."
>
> Dep. of Assistant Chief of Police Wayne Stephens.
>
> "Q. So the fact that there were court papers was an indication or should have been an indication there is something more involved?
> A. It was the tickler to a policeman to say, hey, there's something here but where do we go with it? If you ask me to handle a burglary or a red light I'll tell you that, but nobody ever spelled it out how to handle a Protection From Abuse."
>
> Dep. of Assistant Chief of POlice Wayne Stephens.
>
> "Q. Are you aware of whether he [Miller] was ever pursued and arrested as a result of that incident?

was I would have been the arresting officer.
Q. Now, why wouldn't he have been arrested?
A. Why wouldn't he have?
Q. Yes, if he broke into the apartment in violation of the order.
A. I don't know. Probably because be (sic) couldn't find him. On my incident we couldn't find him. We checked his residence and we had a description of the car and we just couldn't find him.
Q. That night?
A. Yes, precisely.
Q. But you could have issued a warrant and then picked him up subsequently?
A. I guess we could have.
Q. Now, wouldn't it be fair to say that was not your practice with respect to violators of Protection Against Abuse Orders prior to March 28th of '85 when she was killed?
A. Probably. It's probably more discretionary than anything else."

Dep. of Officer S. Solivan

"You indicated that the police really didn't have a policy with respect to these Protection Against Abuse Orders?
A. Each case was kind of left up to the officer's discretion at that particular incident, not only Dudosh but anyone."

Dep. of Officer D. Leauber

"A. There was no policy I was aware of."

Dep. of Officer Schwartz.

"Q. Assuming that you learned there were Protection Against Abuse Orders that would prohibit him, (Miler) from

A. At that time the policy [illegible]
necessarily make an arrest.
Q. What was the policy as you understood it to be?
a. As I understood it was to take whatever action might be necessary to resolve the situation."

Dep. of Officer J. Stauffer.

"Q. First of all, are you aware of any policy in writing prior to March 28th?
A. No, I'm not.
Q. Are you aware of any verbal policy?
A. No.
Q. So this particular area was largely in the discretion of the police officer?
A. Yes."

Dep. of Officer V. Markowitz.

"Q. Your testimony is, therefore, you don't know if there was a written or unwritten policy.
A. That's correct, I don't I'm not aware of it.
Q. ...As I understand your testimony, you didn't have the benefit, at least you didn't have the benefit of any policy?
A. Not that I recall.
Q. So you were in a position where you used your own discretion?
A. Yes."

Dep. of Officer R. Mongelutz.

"Q. ...Now what was the policy of the police dept. regarding what you as an investigating officer should do prior to March 28, 1985 if you appear on the premises and found a person who was in apparent violation of the

every call is different. [illegible]
different."

Dep. of Marakovitz.

"Q. Were you aware of a particular policy as by the police dept. or by the City of Allentown as to what you should do should you find a violator of a Protection Against Abuse Order?
A. In some sort of writing?
Q. Either written.
A. Handed down?
Q. Correct, either written or unwritten by your Chief, by your supervisors, by the mayor.
A. Not that I recall."

Dep. of Officer Markowitz

"Q. Did you receive any special instructions or training regarding enforcement of Protection Against Abuse Orders prior to March 28, 1985?
A. Special in what way? Special how?
Q. In the sense of how to protect that person who has the Protection Against Abuse Order and whether to make an arrest and what criteria you should use and so forth?
A. I didn't personally, no."

Dep. of Officer B. Giacobbe.

"Q. ...Are you aware of or can you tell us what the policy of the City, of the Allentown Police Department was concerning arrest of violators of Protection Against Abuse Orders prior to March 28, 1985?
A. What the departmental policy was, no, I don't have any idea.

was communicated to you?
A. No, there was none that i knew of."

Dep. of Officer Sheetz.

"Q. What you're really saying is that you are not aware of whether the City had a policy or didn't have a policy as to how to handle these particular matters?
A. If they did I didn't know whether they did or not."

Dep. of Officer Sheetz.

"Q. What policy did the police department have with regard to how a police officer should react to violations of Protection Against Abuse Orders prior to March 28, 1985?
A. We had a policy in effect where a police officer basically had to use his discretion at the time when responding.
Q. What policy did the police department have with respect to reacting to violations of the Protection Against Abuse Orders?
A. At that time?
Q. At that time, March of 1985.
A. At that time, I really couldn't say what their policy was. I was never really informed as to exactly what to do in that kind of situation."

Dep. of Detective James Balliet.

Based upon this record, the trial court granted summary judgment in favor of Defendants and against Plaintiff on Due Process

relationship created between Decedent and Allentown Police Department which imposed upon the officers and City of Allentown a "constitutional duty" to protect Decedent on the facts of this case[1], even though Decedent was actually within the protective custody of the police who exposed her to a known danger by escorting her up to the apartment, using her body to shield them from injury, and fleeing the scene and leaving her bleeding in the hallway after the shooting even though the shooter had retreated back into the

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[1] The PFA Order of 10/26/84 provides as follows:

> "The Allentown Police Department is hereby directed to enforce the Order of October 19, 1984, and remove Respondent from the premises at 336 North 9th Street should they be notified by the Petitioner that the Respondent has violated the Order."

Similarly, the trial court found that the Plaintiff "...failed to present any evidence whatsoever, expert or otherwise, that the individual Defendants were, in fact, inadequately trained because they had not received any instructions on the handling of domestic complaints." Hence, the trial court also granted summary judgment in favor of Defendant, City of allentown, and against Plaintiff on its Due Process claim concerning failure to train officers on handling the enforcement of protection from abuse orders. On 8/28/87, after Defendants filed an appeal to the U.S. Court of Appeals purportedly on the limited question of qualified immunity, the trial court granted sua sponte certification to Plaintiffs to seek permission from this Court on the question of the granting of summary judgment against Plaintiff on the Due Process claims. The Defendants then complained to the trial court

on the denial of the summary judgment claim insofar as it related to Plaintiff's Equal Protection claim. On 9/30/87, the trial court entered an Order "once again" denying certification to Defendants on the Equal Protection claims.

Despite the fact that certification under 28 U.S.C. Section 1292(b) was twice denied by the trial court, the Defendants proceeded to appeal as if it were granted, and as if the Court gave Defendants permission for leave to appeal and argued the merits of the Equal Protection claims and not the issue of "qualified immunity". The Court of Appeals dismissed Defendant's Appeal, vacated and remanded with respect to the individual Defendants, and denied Plaintiff's Petition for Rehearing. The matter is now before this Honorable Court for disposition of Plaintiff's Petition For Writ of Certiorari.

FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter as to call for an exercise of this Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF CONSTITUTIONAL LAW BY ACCEPTING THE RESPONDENTS' PRETEXTUAL ARGUMENT OF KNOWN INTRUDER VERSUS UNKNOWN INTRUDER AS PETITIONER'S CHARACTERIZATION OF THE SEX DISCRIMINATION WAS TWOFOLD:

A) THE INDIVIDUAL OFFICERS WHO FAILED TO GIVE THE DECEDENT SAFE PROTECTION THEY WOULD HAVE PROVIDED A MALE FACED WITH A FORCED ENTRY INTO HIS HOME MERELY BECAUSE SHE WAS A WOMAN; AND

B) BECAUSE THIS WAS A DOMESTIC CASE WITH A WOMAN THE VICTIM, THE POLICE DID NOT PROVIDE THE DECEDENT WITH THE HIGH DEGREE OF PROTECTION THAT THEY WOULD HAVE PROVIDED A NON-DOMESTIC CASE WHERE A VIOLENT PERSON FORCIBLY BROKE INTO A PRIVATE RESIDENCE?

Plaintiff's claim of sex discrimination has been clear:

1) the Plaintiff's Decedent was discriminated against because of her sex by the two individual Allentown Police Officers, and also by the City of Allentown because more protection would have been provided a male faced with a forced entry into his home; and 2) the police officers and City of Allentown, because of the nature of her complaint, namely, because it was a domestic violence complaint, the police officers and City did not provide her with the high degree of protection that they would have provided a non-domestic case where a violent person forcibly broke into a private residence.

The Defendant's response was pretextual: neither the individual officers nor the City discriminated against Plaintiff's Decedent because she was a woman but rather the officers treated her differently because this

intruder. At best for Defendants, this argument is pretextual. See, Cuddy v. Carmen, 694 F.2d 853, CD (Cir, 1982); Elliott v. Group Medical & Surgical Service, 714 F.2d 556, (5th Cir, 1983); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 81-82 (2nd Cir, 1983); Sweat v. Miller Brewing Co., 708 F.2d 655, 656, (11th Cir, 1983). At worst for Defendants, this approach can almost be characterized as a "confession" or "admission" of sex discrimination against women because it is only within the context of a woman being protected by a Protection From Abuse Order that the police would ever "know" the identity of the violent intruder inside prior to his investigation.

Can there be any instance--other than a domestic case--where police would arrive at a burglary scene and know the identity of the intruder? One would have to spend hours of quiet meditation to conjure up a scenario where police would respond to a non-domestic

"intruder" in advance of the investigation.

The simple fact is that Plaintiff's evidence clearly indicates that Defendants, Schwartz and Warg intentionally treated Kathleen Dudosh differently than they would have any male reporting a burglary, and especially a male reporting a burglar whose identity the police knew and who the police further knew had violent propensities. In fact, the Defendants concede this differing treatment, and attempt to justify it without directly referring to the sex of the victim by adopting the rationale of "known intruder" versus "unknown intruder". That distinction however, is wholly artificial, and is nothing more than a pretext to justify discrimination by police officers against women in enforcing Protection From Abuse Orders.

Furthermore, holding that Plaintiffs must show that Decedent was treated "...differently in some relevant way than they would have treated a <u>similarly-situated male</u>

The court has affirmatively condoned sex discrimination against women by police officers enforcing Protection From Abuse Orders.

The reality is that almost all Protection from Abuse Orders are orders protecting women from violence by men. To require Plaintiff to establish that Decedent was treated differently from men under the protection of a Protection From Abuse Order is to ignore the crucial reality: Protection From Abuse Orders almost exclusively protect women, and the known intruder versus unknown intruder is an after-the-fact pretextual argument by the individual officer to justify sex discrimination against women. See, Dothard v. Rawlinson, 433 U.S. 321, 53 LE.2d 786, 97, S.Ct. 2720 (1977), (where the court struck down as pretextual standards which were facially neutral but discriminatory as applied to women). See, also, Reed v. Reed, 404, U.S. 71, 30 LED.2d 225, 92 S.Ct. 251 (1971 and Frontiero v.

93 S.Ct. 1764 (1973), (concerning improper categorization on the basis of sex which is prohibited by the Equal Protection Claims of the Fourteenth Amendment. On the record, the individual officers who treated Plaintiff's Decedent differently because she was a women with a Protection From Abuse Order with a known violent criminal inside the house are not entitled to qualified immunity because the police officers ought to have known that they cannot discriminate against women in providing police protection. Craig v. Boven, 429 U.S. 190, 197, 50 LED.2d 397, 97 S.Ct. 451 (1976); Smith v. Ross, F.2d 33, 37 (6th Cir, 1973).

The order vacating and remanding summary judgment against the individual Defendants is thus erroneous. Hence, Plaintiff's Petitin For a Writ of Certiorari ought to be granted.

CLAIM OF SEX DISCRIMINATION AGAINST PLAINTIFF'S DECEDENT BY THE INDIVIDUAL DEFENDANTS IS NOT SUSCEPTIBLE TO THE DEFENSE OF "QUALIFIED IMMUNITY" BECAUSE THE LAW HAS BEEN "CLEARLY ESTABLISHED" THAT POLICEMEN MAY NOT DISCRIMINATE AGAINST WOMEN IN PROVIDING ADEQUATE PROTECTION MERELY BECAUSE OF THEIR STATUS AS WOMEN, OR MERELY BECAUSE THE COMPLAINT ARISES FROM DOMESTIC VIOLENCE?

For purposes of Plaintiff's appeal on the issue of qualified immunity, the Third Circuit was bound by the trial court's determination that Plaintiff offered evidence substantiating the claim of sex discrimination. Specifically, the trial court noted that the "...Equal Protection Clause does indeed preclude the tactical decision by the individual Defendants if their motivation was the Decedent's sex, or possibly the nature of the complaint she filed." Memorandum and Order, August 6, 1987, p. 18. The only issue, then properly before the Court on a limited qualified immunity appeal was given the sex discrimination practiced by Defendants against Plaintiff's Decedent, are

from suit because the right to be free from sex discrimination in receiving police protection was not a "clearly established" right at the time of the death of Plaintiff's Decedent? When Defendants' appeal is understood within this light, then the answer is obvious, and the patent frivolity of Defendants' appeal is manifest.

The law is clear that police officers are liable under 42 U.S.C. Section 1983 when they, by their inaction, fail to perform a statutorily imposed duty to enforce the laws equally and fairly. See, Smith v. Ross, 482 F.2d 33, 37 (7th Cir, 1973); Byrd v. Brishke, 466 F.2d 6, 9-10 (7th Cir, 1972); Whirl v. Kern, 407 F.2d 781 (5th Cir, 1968), cert denied 396 U.S. 167, 174, 180, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Catlette v U.S., 132 F.2d 902, 906-907 (4th Cir, 1943); Huey v. Barloga, 277 F.Supp. 864 (N.D., Ill, 1967); Cox v. Louisiana, 379

471 (1965); Watson v. City of Memphis, 373 U.S. 526, 535, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963); Edwards v. South Carolina, 372 U.S. 229, 237, 83 s.Ct. 680, 9 L.Ed.2d 697 (1963); Cooper v. Aaron, 358 U.S. 1, 16, 78 S.Ct. 1401, 3 L.Ed.2d (1968); Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed.2d 1131 (1949).

As succinctly observed in Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir, 1983), witholding police protection because someone is a member of a minority group obviously offends the Equal Protection Clause of the Fourteenth Amendment:

> "If the defendants had withheld protection from the plaintiffs' decedents because they were blacks or members of some other vulnerable minority-if the defendants were discriminating in a vicious or irrational fashion-there would be an equal protection issue. See, Smith v. Ross, 482 F.2d 33, 36-37 (6th Cir, 1973) (per curiam."

On March 28, 1985--the date of Decedent's death--the law was clearly

could not discriminate against Plaintiff's Decedent in making police protection available to her merely because she was a woman, or merely because she was the victim of domestic violence. In fact, the law was so clearly established Pennsylvania's Protection From Abuse Act, 35 P.S. Section 10185 et seq., was almost nine (9) years old, and Pennsylvania Rules of Civil Procedure, Rule 1901 et seq. were in place for eight (8) years.

Quite frankly, it is preposterous to suggest that the individual police officers believed in March of 1985 that they could discriminate against Plaintiff's Decedent because she was a woman, and women who were victims of domestic violence did not deserve the same level of protection that other crime victims received. Defendants implicitly recognized this, and have, in fact, abandoned their argument that the behavior of the

the Plaintiff's Decedent because of her sex was "qualifiedly immune". Instead, the Defendants argue that the Defendants did not do it:

> "Pursuant to the facts developed from the depositions of various Allentown Police officers and other facts presented, Dudosh established that the Allentown Police Department responded to all 'unwanted person' calls but once on the scene depending upon whether the intruder was known or unknown employed different safety tactics. There is no evidence of record that appellants discriminated or provided different treatment to complainants based on their gender. The best that the record can establish is a distinction predicated upon appellant's knowledge of an in-truder's identity. However, in all cases, the level of protection provided by appellants was equal to the level of danger perceived.
>
> If the facts established on the record were reduced to admissible evidence and viewed in a light most favorable to Dudosh, a jury could not find in his favor. Therefore, summary judgment is proper in this case because Dudosh will be unable to carry his burden of demonstrating that all persons similarly situated were not treated equally and that they deserved to be so treated."
>
> Appellants' Brief, pp. 17-18

That argument postulates that the trial court mis-read the record, and improperly denied Defendants' Motion For Summary Judgment on the merits of the case. That argument cannot be made on appeal until after the jury trial. Chincello v. Fenton, supra.

Note further that Defendants claim that "...Dudosh will be unable to carry his burden..." Appellants' Brief to the Third Circuit, p. 18. As indicated in Kovats v. Rutgers, The State University, 822 F.2d 1303 (3d Cir, 1987), the burden of proof in the defense of qualified immunity rests with the Defendants:

> "Officials claiming qualified immunity bear the burden of pleading and proof."
>
> 822 F.2d at 1312, 1313

Hence, the true nature of the Defendants' challenge was clear: Defendants are not claiming that they pleaded, and proved, qualified immunity. Instead, Defendants contended that Plaintiff did not prove a

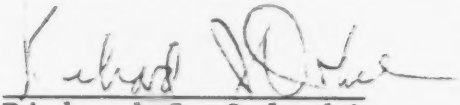
discrimination. The trial court found otherwise. That appeal is interlocutory, and not before the Court. Hence, the Court Order vacating and remanding summary judgment against individual Defendants on the issue of qualified immunity is erroneous as a matter of law.

Hence, Plaintiff's Petition for a Writ of Certiorari ought to be granted.

CONCLUSION

For the foregoing reasons, Plaintiff's Petition For a Writ of Certiorari ought to be granted.

ORDOSKI & HINGA



Richard J. Orloski,
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1522

DUDOSH, EDWARD, Administrator of Estate of KATHLEEN DUDOSH

vs.

THE CITY OF ALLENTOWN, SCHWARTZ, DEAN, and WARG, DANIEL,

Appellants

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges

The petition for rehearing filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ Walter F. Stapleton

Dated: July 12, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1522

DUDOSH, EDWARD, Administrator of Estate of KATHLEEN DUDOSH

vs.

THE CITY OF ALLENTOWN, SCHWARTZ, DEAN, and WARG, DANIEL,

Appellants

On Appeal From the United States District Court For the Eastern District of Pennsylvania (Civil Action No. 85-4066)

Argued February 1, 1988

BEFORE: SLOVITER, STAPLETON, and MANSMANN, Circuit Judges

(Opinion Filed June 16, 1988)

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OPINION OF THE COURT

STAPLETON, Circuit Judge.

The City of Allentown and two of its police officers appeal from the denial of their motions for summary judgment in this civil rights suit brought under 42 U.S.C. §§ 1983 and 1985(3) (1982). Because we find

that the officers may be entitled to qualified immunity, we will remand for further proceedings with respect to them. We will dismiss Allentown's appeal for want of appellate jurisdiction because the city is not entitled to assert a defense of qualified immunity.

I.

Prior to October, 1984, Kathleen Dudosh, appellee's decedent, and Richard P. "Tex" Miller lived together in Allentown, Pennsylvania, for approximately two and one-half years. On October 19, 1984, Dudosh obtained a temporary Protection From Abuse (PFA) order against Miller in response to a petition in which she alleged that Miller had threatened to kill her and had physically abused her on several occasions starting in July, 1984. The PFA order and petition were both served on the Allentown Police Department.

After several incidents in which the Allentown Police were called and had to remove Miller from Dudosh's premises, the PFA order was made permanent on January 21, 1985. The permanent PFA order directed Miller to refrain from abusing or threatening to abuse Dudosh and to stay away from her residence. The court issuing the PFA order also directed that a copy of the order be served on the Allentown Police Department.

The permanent PFA order did not deter Miller. Within a week of its issuance, Dudosh reported several violations of the order by Miller. On January 26, 1985, Miller was arrested for indirect criminal contempt pursuant to the PFA order after he was found on Dudosh's front porch. Miller was eventually found guilty and sentenced to six months' suspended sentence. The next reported incident occurred on March 17, 1985, when

Dudosh reported an attempted entry by Miller into her residence and a threat by Miller to kill her.

Finally, on March 28, 1985, Miller shot and killed Dudosh and then committed suicide. Dudosh had contacted the Allentown police after being informed by a neighbor, Arlene Bell, that Miller had entered her apartment through a locked window at the top of a fire escape on the side of the building. Bell did not see whether Miller had any weapons. Appellants Daniel Warg and Dean Schwartz, of the Allentown Police Department, arrived on the scene, and Dudosh handed Warg a copy of the PFA order, which he began to read. Bell testified that she told Dudosh that Miller would kill her and warned her not to go upstairs with the officers. Bell stated further that Dudosh responded, "I can handle him." Although Warg and Schwartz

testified that they did not hear the conversation between Bell and Dudosh, Bell testified that the conversation occurred within earshot of the two officers.

Despite Bell's warning, and without either encouragement or discouragement from Warg and Schwartz, Dudosh accompanied the two officers upstairs. On the way up, Schwartz asked her whether there were any guns in her apartment, to which she replied in the negative. Upon reaching Dudosh's second floor apartment, she unlocked the door. The door was swung open and Schwartz yelled, "He has a gun." Schwartz then stepped back from the doorway. Miller entered the doorway and shot Dudosh in the chest with a shotgun. Miller then retreated into the apartment and the two officers withdrew down the stairway. Shortly thereafter, Miller committed suicide using the same shotgun he had used to shoot Dudosh.

Appellee Edward Dudosh, Kathleen's father, commenced this suit on July 12, 1985. The suit seeks damages against the City of Allentown and Officers Warg and Schwartz for alleged state law violations, and for alleged deprivation of rights guaranteed by the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

The appellants filed a motion to dismiss. The district court granted the motion with respect to the pendent state law claims against the City of Allentown and against the individual officers for negligent acts of omissions. The court denied the motion with respect to the federal claims and the state claim alleging that the actions of the individual defendants constituted actual malice or willful misconduct. Dudosh v. City of Allentown, 629 F.Supp. 849 (E.D. Pa. 1985).

After discovery, the appellants moved for summary judgment. The district court granted the motion with respect to the due process claim, but denied the motion with respect to the equal protection claim, except insofar as the claim against the City of Allentown was based on a theory of "inadequate training." The court rejected the appellants' claim that they are protected by qualified immunity. Dudosh v. City of Allentown, 665 F.Supp. 381 (E.D. Pa. 1987).

Both parties filed motions for reconsideration and for certification of appeal under 28 U.S.C. § 1292(b) (1982). After modifying some of its conclusions concerning factual inferences that could be drawn from the record, the court affirmed its earlier order in all respects and denied the certifications of appeal. Dudosh v. Warg, 668 F.Supp. 944 (E.D. Pa. 1987). This appeal followed.[1]

[1]After the appeal was filed the district court certified for appeal its judgment granting the defendants' motion with respect to the due process claim. Dudosh then sought permission to file a cross-appeal under Fed. R. App. P. 5. This court denied the request. Thus, only the defendants' appeal is before us.

II.

As a preliminary matter, we must determine whether we have jurisdiction. Ordinarily, a district court's denial of a summary judgment motion is not "final" within the meaning of 28 U.S.C. § 1291 (1982) and therefore is not appealable. See, e.g. Metex Corp. v. ACS Indus., Inc., 748 F.2d 150, 153 (3rd Cir. 1984). However, a district court's denial of a claim of qualified immunity, to the extent it turns on a question of law, is an appealable final

decision under Section 1291. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). For this reason, we conclude that we may consider the appeal of the individual defendants. The City of Allentown, however, is not entitled to assert the claim of qualified immunity. Hynson ex rel. Hynson v. City of Chester, 827 F.2d. 932 (3rd Cir. 1987), cert. denied, 108 S. Ct. 702 (1988). For this reason, we do not have jurisdiction over Allentown's appeal, and we will dismiss it.

III.

We stress at the outset that the plaintiff's due process claims against the individual defendants are not before us and we express no opinion concerning them. The sole issue properly before us is whether the

district court erred in failing to hold that the individual defendants are entitled to qualified immunity from damages on the plaintiff's equal protection claims.

Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, our focus must be on whether Officers Warg and Schwartz should have known at the time of Kathleen Dudosh's death that their conduct constituted a violation of rights secured to her by the Equal Protection Clause. Alternatively stated, we must determine whether reasonable officers in the defendants' position would

have known that the defendants' alleged conduct would violate Dudosh's rights under the clause. We cannot answer these questions in the affirmative unless "the facts alleged (by the plaintiff...) support a claim of violation of clearly established law." Mitchell, 472 U.S. at 528 n.9.

The Supreme Court recently provided additional guidance on qualified immunity analysis in Anderson v. Creighton, 107 S.Ct. 3034 (1987). There, the plaintiff alleged that an FBI agent had conducted a warrantless search of the plaintiff's house without probable cause and had found nothing. The Court held that the agent was entitled to qualified immunity if a reasonable officer in his position could have believed his alleged conduct to be lawful. Id. at 3042. The Court stressed that an inquiry as to whether a "clearly

established" right has been violated must be conducted with some particularity lest the Harlow rule become divorced from its rationale:

> The Operation of [the Harlow] standard...depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow.. ..It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable

> official would understand that what he is doing violates that right.

Id. at 3038-39 (emphasis added) (citations omitted).

In addition to the cautionary instruction regarding the necessity of a particularized inquiry concerning "clearly established law," Anderson includes two related teachings that are helpful in resolving this case. First, a right is not "clearly established" unless it has been recognized in similar or analogous circumstances; only when the right has been so recognized can it be said that an official should have been aware that his conduct was unlawful. Id. at 3039. ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been helf unlawful, ...but it is to say that in light of pre-existing law the unlawfulness must be apparent.").

Second, the "reasonable official" test includes a factual as well as a legal component: immunity cannot be denied unless, based upon the facts the official knew or should have known, a reasonable official would have realized that his conduct was unlawful. Id. at 3040 ("The relevant question in this case... is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.").

IV.

Anderson, requires that we look to a more particularized right than merely the broad right to equal police protection on which the district court focused. See 665 F.Supp. at 394. To do this, we must identify each of Dudosh's equal protection claims with some

precision. Because of the conclusory nature of the allegations in the plaintiff's complaint, this is a difficult task.

The complaint alleges at the outset that "at all relevant times" the individual defendants "were implementing official government policy of the Defendant, City of Allentown concerning the handling of a citizen complaints by women and concerning the handling of complaints of domestic violence in general and by persons with protection-from-abuse orders in particular." Complaint Para. 5. It is important to note that the complaint does not allege that Officers Warg and Schwartz participated in developing or adopting this policy; rather, the complaint alleges only that the two officers merely implemented this policy.

In Count Two of the complaint, which sets forth the equal protection claims against the individual defendants, the plaintiff alleges

only that "[t]he decedent was a member of a class of people consisting of abused females victimized by domestic violence" and that "Schwartz and Warg...violated decedent's rights to equal protection of the laws as a member of that class." Complaint Para. 33. In Count Four, which sets forth the equal protection claim against the City, the plaintiff alleges only that it had a "negligent, reckless, wanton and willful policy of invidious discrimination in the handling of domestic complaints and specifically in failing to provide Plaintiff's decedent with reasonable protection under the circumstances." Complaint Para. 45.

Since we think that this appeal presents serious issues regarding entitlement to qualified immunity and that the defendants should not be prejudiced by the generality of

the plaintiff's pleading, we chose in this instance to look to the plaintiff's briefing for a more specific articulation of the plaintiff's equal protection claim. There, the plaintiff asserts that the City had a policy of discriminating between intruder cases in which the person calling for help does not know the intruder (e.g., burgulary cases) and intruder cases in which the person soliciting aid does know the intruder (e.g., so-called "domestic" cases). In the former class of cases, the appropriate response is allegedly dictated by department policy and includes a requirement that a caller who is not on the premises be kept away from the premises until the intruder is removed. In the latter class of cases, it is the policy that the appropriate response is left up to the discretion of the officers responding to

the call based upon what they find on the scene, and the department does not instruct its officers that the caller must be kept away from the premises until the intruder is gone. Obviously, this case falls in the latter class.

We do not understand the plaintiff to argue before us that Schwartz and Warg intentionally treated Kathleen Dudosh differently in some relevant way than they would have treated a similarly-situated male treatened by an estranged former companion and that the City is responsible for this conduct as well because its policy left the appropriate response to their discretion. Portions of the district court opinion, however, suggest that it understood plaintiff to be making such a claim and on remand this matter should be clarified. If plaintiff can, consistent with

with Fed. R. Civ. P. 11, allege that Schwartz and Warg would have conducted themselves in a way that would have prevented a similarly-situated male from going to his apartment, but deliberately chose to do otherwise with Kathleen Dudosh because of her sex, he should be allowed to amend the complaint to so state. If he does, we would agree with the district court that the plaintiff's allegations will support a claim against the individual defendants of a violation of a well-established right under the Equal Protection Clause--the right to be free of purposeful gender discrimination in the provision of police protection.[2]

---

[2]It is clearly established that an intentional discriminatory classification by state officers based upon sex violates the Equal Protection Clause, unless it is substantially related to an important governmental purpose and no one suggests that there could have been such a purpose if the officers in this case intentionally

engaged in gender discrimination. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976). In addition, police officers have a constitutional duty to enforce the laws equally, and they can violate the Equal Protection Clause when through their inaction they breach their duty. Smith v. Ross, 482 F.2d 33, 37 (6th Cir. 1973) (per curiam); see also Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984); Thurman v. City of Torrington, 595 F.Supp. 1521, 1526-29 (D. Conn. 1984) (denying city's motion to dismiss where plaintiff alleged that police provided lower level of protection to women abused by a spouse or boyfriend than to other abuse victims), cited approvingly in Estate of Bailey by Oare v. County of York , 768 F.2d 503, 510 (3rd Cir, 1985) (in banc.); Bartalone v. County of Berrien, 643 F.Supp. 574, 576-77 (W.D. Mich. 1986) (denying motion to dismiss where plaintiff alleged that police failed to protect her from abuse by her husband because of her sex or marital status); Lowers v. City of Streator, 627 F.Supp. 244, 246 (N.D. Ill. 1985)(denying motion to dismiss where plaintiff alleged that officers' failure to arrest and investigate a man who had raped her was a result of her being a woman). See generally Note, Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?, 95 Yale L.J. 788 (1986).

The plaintiff has articulated quite different claims before us, however, and, if

they are the only equal protection claims he can assert, the district court erred in failing to recognize the merit of the defendants' claim to qualified immunity. Those two claims, as we understand them, are that Schwartz and Warg's implementation of Allentown's policy violated a clearly established right guaranteed by the Equal Protection Clause because the Department's differentiation between known and unknown intruder cases lacks a rational basis, and because the Department's policy has a disparate impact on women. We will discuss each claim in turn.

A.

Because victims of domestic crimes are not members of a suspect class, a police department policy that treats domestic cases in a different manner than unknown intruder

cases is constitutionally permissible if it meets the rational basis standard, that is, if it is rationally related to a legitimate state interest. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973). Accordingly, the issue in connection with this claim is whether a reasonable policeman in the position of the individual defendants, in light of clearly established preexisting law, would have recognized that it would be unlawful for them to implement a policy that distinguished between known and unknown intruders. We believe that to state this question is to answer it. Nothing asked of these policemen by their superiors was so irrational that reasonable policemen in their position would have known their conduct to be unconstitutional. Plaintiff points to nothing that comes close to suggesting that the unlawfulness of their conduct under the

Equal Protection Clause should have been apparent.

B.

A municipal policy that is facially neutral in its treatment of women but has a disparate impact on women does not violate the Equal Protection Clause unless adoption of the policy was motivated by a discriminatory animus or intent. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979). Purposeful discrimination may be found if the policy is adopted "at least in part 'because of', not merely 'in spite of,' its adverse effects upon identifiable group." Id. at 279. While it is true that a showing of disparate impact can constitute circumstantial evidence from which a factfinder may infer a discriminatory intent, such evidence must be evaluated in context.

Although a facially neutral policy whose disparate impact on women in fact reflects intentional gender discrimination would violate clearly established law, the two officers in this case are nevertheless entitled to qualified immunity because they cannot reasonably have been expected to know that carrying out the policy provided to them by their supervisors would violate Kathleen Dudosh's rights under the Equal Protection Clause. As in Anderson, an appropriate analysis of whether conduct of law enforcement officers is objectively reasonable requires an "examination of the information possessed by the...officials." 107 S.Ct. at 3040. In particular, for a reasonable police officer to know that he or she is violating a victim's equal protection rights by executing a facially neutral municipal policy like the one

here alleged, he or she would have to know (1) that the policy has a disparate adverse impact on women; (2) that the circumstances surrounding the adoption of the policy indicate that bias against women was a motivating force; and (3) that the policymakers did not have an important public interest that they intended to serve by adopting the policy.

The plaintiff's complaint and brief in this case, to the extent relevant to thie equal protection claim, allege only that Schwartz and Warg, as line officers, implemented a facially neutral policy which had a disparate adverse impact on women. Even assuming that this disparate impact reflected purposeful gender discrimination on the part of the originators of the alleged policy, the plaintiff suggests no basis for concluding

that Schwartz and Warg should have known that their implementation of the policy on March 28th would violate Kathleen Dudosh's right to equal protection.

V.

For the foregoing reasons, we will dismiss the City of Allentown's appeal, vacate the district court's denial of summary judgment to defendants, Warg and Schwartz, and remand for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing Not-For-Publication Opinion.

/S/ Walter Stapleton
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1522

DUDOSH, EDWARD, Administrator of Estate of KATHLEEN DUDOSH,

vs.

THE CITY OF ALLENTOWN, SCHWARTZ, DEAN, and WARG, DANIEL,
Appellants

(D.C. Civil No. 85-44066)
ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present, SLOVITER, STAPLETON and MANSMANN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel February 1, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 10, 1987 be, and the same is hereby vacated insofar as summary judgment was denied as to defendants Warg and Schwartz and

for further proceedings consistent with the opinion of this Court. It is further ordered and adjudged that the City of Allentown's appeal is dismissed.

ATTEST:

/S/ M. Elizabeth Ferguson
Chief Deputy Clerk

June 16, 1988

Page 2

Certified as a true copy and issued in lieu of a formal mandate on July 20, 1988.

Test: M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD DUDOSH, Administrator of the Estate of KATHLEEN DUDOSH	C.A. No: 85-4066
v.	
DANIEL WARG; DEAN SCHWARTZ; and CITY OF ALLENTOWN	

TROUTMAN, S.J.

ORDER

AND NOW, this 6th day of August, 1987, upon consideration of the Motions For Reconsideration filed on behalf of all parties and the responses thereto, IT IS ORDERED that said Motions For Reconsideration are DENIED. IT IS FURTHER ORDERED that the Motions For Certification pursuant to 28 U.S.C.A. §1292(b) (West Supp. 1987) filed on behalf of all parties are DENIED without prejudice.

/S/ E. Mac Troutman
S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD DUDOSH, Administrator of the Estate of KATHLEEN DUDOSH	:	
vs.	:	CIVIL ACTION NO: 85-4066
DANIEL WARG; DEAN SCHWARTZ; and CITY OF ALLENTOWN	:	

MEMORANDUM AND ORDER

TROUTMAN, S.J. August 6, 1987

On May 18, 1987, we granted in part and denied in part the defendants' motion for summary judgment. Both the plaintiff and the defendants have moved for reconsideration of that Order, the plaintiff asserting that we erred in granting the defendants partial summary judgment and the defendants contending that we erred in failing to grant their motion in its entirety. The plaintiff has also requested, if we deny its Motion For

Reconsideration, that we certify for appeal pursuant to 28 U.S.C.A. §1292(b) (West Supp. 1987) that portion of our Order granting the defendants partial summary judgment. In response, the defendants request, if we deny their Motion For Reconsideration, that we also certify for appeal, if we grant the plaintiff's Motion For Certification, that portion of our Order denying them summary judgment. Our Memorandum and Order of May 18 speak for themselves, and we see no need for a lengthy review of the basis for and effect of our decision. Stated succinctly as possible, we granted both the individual defendants and the municipal defendant summary judgment as to the plaintiff's Fourteenth Amendment due process claim on the ground, inter alia, that the defendants possessed no consti-tutional duty to provide the decedent with

police protection, adequate or otherwise, and therefore, their failure to provide her with such protection could in no way have constituted a violation of her substantive due process rights under the Fourteenth Amendment. We denied the defendants summary judgment on the ground that we could not say that a reasonable jury could not conclude on the basis of the evidence of record that the individual defendants unlawfully discriminated against the decedent, either on the basis of her sex or the nature of the complaint she filed, in the manner in which they handled her request for assistance.[1].

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[1]The distinction between the basis for the alleged discrimination, i.e., whether the defendants descriminated against the decedent because of her sex or because of the type of complaint she filed, is crucial. The importance of the distinction shall be discussed further infra.

We also granted in part and denied in part the municipal defendant's motion for summary judgment as to the claims asserted against it in the context of the plaintiff's equal protection claim.[2]

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[2]Since we suggest that counsel for both parties failed to completely understand the import of our decision, we stress that we examined the liability of the municipal defendant only in the context of the plaintiff's equal protection claim. There was and is no need to consider the scope of the City's liability under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and its progeny in the context of the plaintiff's due process claim since we have concluded that the decedent did not possess a right to police protection, adequate or otherwise, under the facts of this case under the Due Process Clause of the Fourteenth Amendment.

Here, the plaintiff asserted two theories of liability against the City: a "custom" theory and a "failure to train" theory. We denied

the City summary judgment as to the "custom" theory on the ground that there was enough evidence of record upon which a jury could find that the City had, through its silence and/or acquiescence, adopted a policy or custom of discriminating against women and/or those who filed domestic complaints in the manner in which they handled requests for assistance from such individuals. We granted the City summary judgment as to the plaintiff's "failure to train" theory on the ground that the plaintiff had failed to adduce sufficient evidence upon which a jury could reasonably conclude that the City had inadequately trained its police officers such that it could be said that its failure to train constituted a reckless disregard for or deliberate indifference to the constitutional right of its citizen to equal protection of the law.

I. The Plaintiff's Motion For Reconsideration.

A. Factual Errors.

The plaintiff asserts that we committed a variety of factual errors in our decision. As noted in our earlier opinion, however, we are not permitted in the context of resolving a summary judgment motion to engage in the "finding" of facts. We may not draw our own inferences from the record, but rather, must draw all reasonable inferences from the evidence of record in favor of the nonmoving party.

Federal Rules of Civil Procedure 56(c) provides that summary judgment may be granted in favor of the moving party only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." (emphasis added). In applying this standard, we engage ourselves in a three step analysis. The first

step is to examine the record and determine whether there are any genuine issues of fact. If so, all reasonable inferences must be drawn in favor of the non-moving party. The second step is to determine whether the disputed issues of fact are material, i.e., do they have an effect upon our decision as to whether the moving party is entitled to judgment as a matter of law. If such disputed issues of fact are not material, they present no impediment to the entry of summary judgment. The third and final step in our analysis is to take the proper facts of record, and apply them to the relevant statutory or case law.

Here, the plaintiff first states that we erred in "finding" that the Allentown Police Department did not know of Miller's assault upon the decedent which allegedly required her hospitalization and that the Department did not know that Miller had assaulted the

decedent while she was hospitalized. The plaintiff also claims that we erred in our statement of the "undisputed" facts of this case as to certain aspects surrounding the decedent's "hospitalization". The plaintiff is to an extent correct.

In our prior decision, we stated as follows:

> On October 19, 1984, the deceased obtained a temporary Protection-From-Abuse (PFA) order from the Court of Common Pleas of Lehigh County of the Commonwealth of Pennsylvania pursuant to 35 Pa. C.S.A. §10181-10190 (Purdon's Supp. 1986). The deceased, in her petition for the temporary PFA order, stated that she and Miller had resided together for approximately two and one-half years, though they were not married. She further alleged in the petition that on October 10, 1984, Miller threatened to kill her and 'anyone who got in his way'; that he had a drinking problem and had been hospitalized many times for alcohol abuse; that in October, 1984,

Miller'pushed' the deceased, 'hit her around', 'smashed her furniture and made several threats to kill' himself and her; that on another occasion in October 1984, Miller "beat up' the deceased two days in a row, requiring her hospitalization for 'two weeks', during which Miller assaulted her again; and that in August, 1984, Miller 'choked her so hard that he lifted her off the ground two feet while heavily drunk'. (Citation omitted). The Allentown Hospital records contained in the record before us, however, reflect that the deceased was admitted to the hospital on July 18, 1984, and was apparently discharged the following day. The records list her 'admitting diagnosis' as 'depressive disorder'. (Citation omitted). While the records do mention complaints by the decedent that Miller had assaulted her, no where do the hospital records refer to any physical injuries which required that she be hospitalized. More importantly, the plaintiff has presented no evidence that any of the incidents described in the petition were reported to the Allentown Police.

Dudosh v. City of Allentown, et al., Civil Action No. 85-4066, slip op. 3 (E.D.Pa. May 18, 1987).

At the time we issued our decision, we were not cognizant of the fact that the decedent's petition for the PFA Order, as well as the Order itself, had been served upon the Allentown Police Department. (See, Plaintiff's Brief In Opposition To Defendant's Motion For Summary Judgment, Doc. #16, Ex. "D", ¶E)[3]

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[3]Despite plaintiff's assertion to the contrary, we discern no provision of Pennsylvania Protection From Abuse Act which would have required that a copy of the decedent's Petition be served upon the Allentown Police Department. Section 7 of the Act merely provides that, "A copy of any order under this act shall be issued to the plaintiff, the defendant and the police department with appropriate jurisdiction to enforce the order or agreement." 35 Pa.C.S.A. §10187 (Purdon's 1977). Nevertheless, pursuant to the specific instructions of the Lehigh County Court of Common Pleas as contained in its Order of October 19, 1984, a copy of the Petition was, in fact, served upon the Allentown Police Department.

Thus we must deem the individual defendants, as well as the municipal defendant, to have been aware of the allegations contained in the decedent's petition for the PFA Order.

As to our statements regarding the decedent's hospitalization, we also erred in our statement that the decedent was discharged from the hospital July 19, 1984, only one day after she had been admitted. According to the plaintiff, the hospital records clearly indicate that the decedent was admitted to the hospital on July 19, 1984, and discharged on July 27, 1984. This is also in error. The "admission form" pertaining to the decedent, as reproduced by plaintiff's counsel, indicates that the decedent was admitted to the hospital on July 18, 1984. (Plaintiff's Motion For Reconsideration, Doc. #19, Ex. "B"). It is

true that the plaintiff was not discharged from the hospital until July 27, 1984. (Id. at "Discharge Summary".)[4]

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[4]The "Discharge Summary" produced by the plaintiff as an exhibit attached to its Motion For Reconsideration was not contained in the record before us when we decided the defendants' summary judgment motion. Portions of the hospital records pertaining to the decedent were reproduced by the defendants and attached as an exhibit to their summary judgment motion. (Defendant's Motion For Summary Judgment, Doc. #15, Ex. "B".) Our prior conclusion that the decedent was discharged from the hospital on July 19, 1984, was based on the notation "0019-2" handwritten into the space designated "Discharge Date" on the Admission From and the fact that the last notation on the decedent's "Progress Record", as reproduced by the defendants, was dated 7/19/84. The plaintiff in his response to the defendants' summary judgment motion did not seek to supplement the hospital records produced by the defendants.

We find no error, however, in our statement that "nowhere do the hospital records refer to any physical injuries which required that she be hospitalized." Dudosh v. City of Allentown, et al. Civil Action NO. 85-4066, slip op. at 3. (Emphasis added). According to plaintiff's counsel, "The records indicate that Decedent was admitted to the hospital after being referred that by Crisis Prevention due to the fact that Miller had beaten Decedent over a period of days immediately after his discharge from the state hospital." (Plaintiff's Brief In Support Of Motion For Reconsideration, Doc. #19, p. 4.) It does not follow from this, however, that the decedent was hospitalized because of physical injuries she received at the hands of Miller.

The hospital "progress record" does indeed describe contusions, abrasions and rashes over various parts of the decedent's body at the time of her admission. The same hospital records, though, indicate that the decedent's "admitting diagnosis" was a "depressive disorder". As stated in our prior opinion, the only inference which may be drawn from the records is that the decedent was admitted to the hospital because of an emotional disturbance, albeit apparently caused by Miller's conduct, and not because of any physical condition. Plaintiff's counsel's continued assertions to the contrary are disingenuous and incredulous.[5]

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[5]If the information contained in the hospital records is untrue or incomplete, it was plaintiff's obligation to submit additional evidence, e.g., the affidavit of the decedent's treating physician, to

supplement the record. He has not, however, submitted any such additional evidence. Further, the questions of when the decedent was admitted to the hospital, the reason therefore, and when she was discharged have been rendered irrelevant based on the fact that a copy of the decedent's Petition for the PFA Order was served upon the Allentown Police Department and not a copy of her hospital records.

The plaintiff next asserts that we erred in our statement that neither of the individual defendants heard any of the conversation which occurred between the decedent and Arlene Bell. See Dudosh vs. City of Allentown, et al., slip op. at 10. The content of the conversation between Bell and the decedent is summarized in our prior opinion and need not be repeated. See, id.[6]

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[6]We note that plaintiff's counsel in their "quotation" of Bell's deposition testimony conveniently failed to quote Bell in context.

On page 6 of their Brief, Doc. #19, they quote Bell as follows: "[Arlene Bell] said, [to Ms Dudosh]: 'You are going to be killed...'" Bell's statement in its entirety reads, "I said, 'You are going to be killed.' I didn't mean with a gun. I meant physically, because he used to beat her..." (Doc. #16, Appendix VIII, deposition of Arlene Bell, p. 11.) (Emphasis added). Plaintiff's counsel also failed to set forth the decedent's rebuke of Bell's admonition in which the decedent responded to Bell, "No; I can talk to him... I can handle him." (Id. at 12.)

As to the plaintiff's assertion that he produced sufficient evidence to contradict the individual defendants' testimony that they did not hear Bell's warnings to the plaintiff, he cites the following deposition testimony of Bell:

> Q: Mrs. Bell, when you warned Kathleen that Tex was upstairs, I think your testimony was that the police were present when you have her that warning.
>
> A: They were behind her, yes.

Q: Were they within earshot of what you told her?

A: Yes; as close as I am to you.

Q: So they would have heard what you told her?

A: Oh, yes.

Q: And when you told Kathleen, 'You will be killed if you go upstairs,' the police heard that?

A: Yes.

Q: And did the police ask you any questions?

A: No.

Q: Did they ask you why you thought that she would be killed?

A: No.

Q: Did the police make any statements whatsoever that you heard--

A: No.

Q: --while you were discussing this with Kathleen?

A: No. She said, 'I can handle him. I can handle him.'

I said, 'Kathleen, you can't. You can't.'

Q: And this was heard by the police?

A: Yes.

(Doc. #16, Appendix VIII, deposition of Arlene Bell, pp. 40-41).

Based on this testimony, we believe a reasonable juror could infer that the individual defendants had, in fact, heard the conversation between Bell and the decedent. To hold otherwise would require that we balance the credibility of the officer's testimony against Bell's testimony as to their close proximity to the location where the conversation occurred. As stated earlier, we may not assess the credibility of testimony or balance the weight of the evidence in deciding a summary judgment motion. Such tasks are for the trier of fact. Thus, we must assume that the individual defendants did indeed hear the exchange.

In sum, in deciding whether the defendants are entitled to a judgment as a matter of law, we take as true: (1) that the Allentown Police Department received a copy of the decedent's petition for the PFA Order and (2) that the individual defendants heard the conversation which occurred between the decedent and Arlene Bell. Making these assumptions, we proceed to examine whether this "new" set of facts alters our prior decision that the defendants were entitled to judgment as a matter of law as to the plaintiff's due process claim, as well as the plaintiff's contention that we erred in this conclusion in the first instance.

B. Errors of Law.

First, the plaintiff asserts that we erred in relying upon the dissent of Judge Adams in Estate of Bailey By Oare v. County of York

("Bailey, 768 F.2d 503 (3rd Cir. 1985), as the basis for our decision that the defendants were entitled to judgment as a matter of law as to the plaintiff's due process claim. This assertion is so patently ridiculous our first reaction was to ignore it. However, for the purpose of educating plaintiff's counsel and putting their minds at ease, we state, once again, that we are fully aware of our obligation, absent contrary precedent established by the Third Circuit Court of Appeals sitting en banc or the United States Supreme Court, to abide by legal precedent set forth by a majority panel of the Third Circuit. We stated such in our prior opinion. See, Dudosh v. City of Allentown, et al. slip op. at 10 n. 3. Further, we did not base our opinion upon Judge Adam's dissent. As we

stated in our prior opinion, we believe that our decision is completely consistent with the panel majority's decision in Bailey. See, id.[7]

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[7]The plaintiff relies heavily upon Escamilla v. City of Santa Ana, 606 F. Supp. 928 (C.D.Cal. 1985), affirmed, 796 F.2d 266 (9th Cir. 1986), a case not cited in the plaintiff's response to the defendants' motion for summary judgment, but cited by this Court in our earlier opinion, for his proposition that we erred in our conclusion that the defendants did not possess a constitutional duty to provide the decedent with police protection. To correct an apparent misunderstanding on plaintiff's counsels' behalf neither the decision of the Ninth Circuit Court of Appeals nor that of the district court in Escamilla represent binding precedent which this Court must follow. While we may look to such decisions for guidance, we are in no way obligated to follow their rule of law. Further, we find much in both decisions which counsels against the position advanced by the plaintiff. Also, the district court's statement in Escamill that, "(a) constitutional duty arises only when the persons acting under color of state law... are aware of a special danger with respect to a particular victim", 606 F.Supp. at 931, represents only dicta, since the police officers in that case were not aware of any special danger to the decedent, and thus, the district court be held liable for deprivation of the decedent's right to due process were such, in fact, the cas

Second, the plaintiff argues in its Motion For Reconsideration that it presented sufficient evidence, such that, "Under the circumstances, a reasonable juror could conclude that the individual defendants' actions 'shock the conscience' and thus rise to the level of a constitutional violation of Decedent's rights." (Plaintiff's Brief In Support of Motion For Reconsideration, Doc. #19, p.3) The question of whether the state actors' conduct "shocks the conscience" is not, however, in the context of defining the outer parameters of substantive due process, a question of fact. It is an issue of law for the cour to decide. The ultimate arbiter of the parameters of substantive due process is, of course, the United States Supreme Court. As a trial court, we must in the first instance

decide whether the defendants' conduct was such that it can be said that their actions deprived the decedent of her right to substantive due process. In making this determination, we are guided by the Supreme Court's metaphor that only government conduct that shocks the judicial conscience may be found to violate the Fourteenth Amendment's Due Process Clause. The "fundamental right" underlying the individuals right to substantive due process in cases such as this is the individuals right to be free from "abusive" government conduct. See, e.g., Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986).

Third, the plaintiff contends that we erred in our conclusion that, "the conduce of the individual defendants, was, at most, negligent", and thus, the defendants could not

be held liable based on the rule of law enunciated by the Supreme Court in Daniels v. Williams, ___U.S.___, 106 S.Ct. 662,88 L.Ed.2d 662 (1986), and Davidson v. Cannon, __U.S.__ 106 S.Ct. 668, 88, L.Ed.2d 677 (1986). Dudosh v. City of Allentown, et al., slip op. at 22. Even if we were to agree that the plaintiff had adduced sufficient evidence upon which a jury could conclude that the individual defendants acted in something more than a negligent manner, our decision that the plaintiff had failed to adduce sufficient evidence upon which this Court could conclude that the individual defendants had deprived the decedent of a constitutional right within the meaning of the Fourteenth Amendment's Due Process Clause would not be altered. To this extent, therefore, our prior conclusion that the individual defendants acted, at most, negligently,

is dicta, and it was unnecessary for us to even reach the issue since we had already concluded that the defendants were under no constitutional duty to provide the decedent with police protection, adequate or otherwise. See, e.g. Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir.), where the Court stated, "It is enough to note that, as currently understood, the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise." (Emphasis added). Absent a constitutional duty, the manner in which the defendants performed their job is of no concern to us.

Fourth, the plaintiff challenges our general conclusion that the decedent possessed no right to police protection, adequate or otherwise, under the Fourteenth Amendment's

Due Process Clause. After having reexamined the evidence in the record before us, and drawing all inferences therefrom in the light most favorable to the plaintiff, inclusive of the new inferences we must draw as discussed earlier, we see no reason to alter our decision.

Stripped to its barest essence, the plaintiff's primary argument is that we did not properly apply the rules of law established by the Third Circuit in Bailey. As stated in our prior opinion, we believe that the facts of Bailey, and that these distinctions dictate a different result in this case. To iterate, this action involves a competent adult. Bailey involved a child. In this case, the decedent, willingly and without force, accompanied the individual defendants to the entrance to her residence. The decedent in Bailey was too young to have a say in the matter of where she should be

placed or who should have custody of her. Despite plaintiff's counsel's assertion otherwise, the decedent in this case was not in "protective legal custody", whereas the decedent in Bailey was taken into custody by the defendant child and youth services agency.[8]

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[8]We find no support in the record for the plaintiff's assertion that the decedent was in the "protective legal custody", as that phrase is utilized in this context, of the individual defendants at the time of her death. As stated above, the decedent willingly accompanied the individual defendants to her apartment. She was not forced, coerced or ordered to do so. The plaintiff has cited us to no authority which would have even justified the defendants placing the decedent in "legal custody". This is not a case where, e.g., an individual has provided state's evidence in return for a guarantee of protection, where the state has incarcerated a person for criminal offenses in a penal institution or where the state has placed a victim of parental child abuse into protective custody pursuant to specific statutory authority.

Finally, the defendant child services agency in Bailey had, in fact, provided the decedent with affirmative protection, by removing her from her mother's home and placing her in foster care, but relinquished that protection.[9]

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[9]We see no need to distinguish between the penal laws of the Commonwealth of Pennsylvania and the State's Protection From Abuse Act. All of those acts which may be proscribed by an order entered pursuant to the Act are prohibited by Pennsylvania's criminal laws. The Protection From Abuse Act simply provides the victim with an alternative remedy to criminal prosecution. Were we to hold otherwise, every time a Pennsylvania court entered an Order pursuant to the Act, the authorities responsible for enforcing the order would become subject to liability under §1983. We would in effect be "constitutionalizing" orders entered pursuant to the Act. We do not believe that such a result is warranted. We also find nothing in the orders that were entered by the Lehigh County Court with regard to the decedent to indicate that the Court was requiring the Allentown Police Department to provide her with any more protection than they would already be authorized to provide her under the State's criminal code.

The Protection From Abuse Act, unlike Pennsylvania's child welfare laws, neither authorized the defendants to remove the decedent from the premises nor did it allow them to place her in custody against her will.

The plaintiff's fifth and final challenge to our decision of May 18 is that we erred in granting the City of Allentown summary judgment as to his "failure to train" theory. Since we have affirmed our decision granting the defendants summary judgment as to the plaintiff's due process claim, we need only consider the plaintiff's failure to train theory in the context of his equal protection claim.

Here, the plaintiff initially argues that we erred in requiring him to submit evidence in the form of expert testimony in order to defeat the City's motion for summary judgment.

Once again, plaintiff's counsel have misconstrued the import of our decision. We, in fact, imposed no such requirement upon the plaintiff. In our memorandum, we simply stated that, "The plaintiff...has failed to presenty any evidence whatsoever, expert or otherwise, that the individual defendants were, in fact, inadequately trained because they had not received any specific instructions on the handling of domestic complaints." Dudosh vs. City of Allentown, et al., slip op. at 35. We fail to comprehend how, from this statement, plaintiff's counsel concluded that we were imposing such a requirement upon them.

Finally, the plaintiff has referred us to no new case law or reasoning that convinces us that our prior decision as to his failure to train theory was in error. Thus, we affirm our prior decision.

II. The Defendants' Motion For Reconsideration.

A. The Equal Protection Claim.

The defendants also request that we reconsider our Order of May 18 to the extent that it denied them summary judgment as to the plaintiff's equal protection claim. The defendants first argue that we have created an impossible standard for them to abide by in holding that they did not violate the decedent's substantive due process rights, but that the plaintiff had stated a "prima facie" case for a denial of equal protection. According to defense counsel's logic, there is no reason why a different standard should be applied to the due process provision of the Fourteenth Amendment than to the equal protection provisions. Defense counsel fails to recognize that the differences between the Due Process Clause and the Equal Protection Clause are not simply distinctions without a difference.

The reason that the individual defendants "tactical decision" to allow the decedent to accompany them to her apartment may constitute a violation of her right to equal protection, but not of her right to due process, is that we are not concerned in the due process context, with regards to this case, with the defendants' motivation for making the decision that they did. Since we have concluded that, under the facts of this case, the decedent possessed no substantive due process right to police protection, it does not matter whether the defendants acted negligently, grossly negligently or recklessly. The level and quality of the services provided by the Allentown Police Department are questions best addressed by the political processes of the City and any state law remedies the plaintiff might possess. However, once

the City assumed the responsibility of providing its citizens with some level of protection, whether it be good, bad, acceptable or otherwise, it also assumed the obligation imposed by the Equal Protection Clause of the Fourteenth Amendment of providing the same level of public services to each of its citizens, regardless of their race, creed, or sex. See, e.g., Jackson v. City of Joliet, supra. If it chooses to provide a lower level of protection to a certain class of individuals, it must, at a minimum, depending on the nature of the classification, articulate a rational basis for the discrimination.[10]

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[10]As noted in our prior opinion, the plaintiff has proffered two "theories" of unlawful discrimination by the defendants. The one is that the defendants discriminated against the decedent because of her sex, i.e., they would have provided a male with a higher degree of protection. The other is that

the defendants discriminated against the decedent because of the type of complaint she filed viz, a "domestic" complaint. As to the former, the defendant, to justify the discrimination, if any, must articulate an "important government interest" underlying such a classification. As to the latter, the defendants must articulate a "rational basis" for the classification. See, Dudosh v. City of Allentown, et al. , slip op. at 25. The defendants, albeit apparently unwittingly, have now articulated a "basis" for distinguishing between domestic cases and other requests for assistance, that basis being that the people involved in a domestic case know each other. (Defendants' Response to Plaintiff's Motion For Reconsideration, Doc. #20, p. 8). The record before us, however, does not allow us to say whether such a reason is "rational". Thus, this issue remains to be resolved at trial. With this in mind, we emphasize that the burden of articulating a reason for such a classification which the Court views as rational is upon the defendants.

If it cannot, then the City has failed to fulfill its obligation under the Fourteenth Amendment's Equal Protection Clause to provide each of its citizens with the same level of protection.

The defendants also argue that they cannot be held liable for any deprivation of the decedent's right to equal protection based on the Supreme Court's decisions in Davidson v. Cannon, supra, and Daniels v. Williams, supra. Defendants' counsel fails to recognize, however, that, by very definition, there can be no "negligent" violations of an individuals right to equal protection. As noted by Judge Posner in Jackson v. City of Joliet, supra, "only deliberate discrimination violates equal protection..." 715 F.2d at 1203. (Emphasis added). Thus, at trial, the plaintiff must demonstrate that the defendants deliberately and unlawfully discriminated against the decedent. The issues of negligence and recklessness are simply not relevant to the plaintiff's equal protection claim.

B. Qualified Immunity.

The defendants next urge that we reconsider our decision that they are not entitled to qualified immunity as to the plaintiff's equal protection claim. Regarding the individual defendants, counsel argues that the Equal Protection Clause does not foreclose the tactics they used, and there is no case law to the contrary. This is untrue. The Equal Protection Clause does indeed preclude the tactical decision made by the individual defendants if their motivation for the decision was the decedent's sex or, possibly, the nature of the complaint she filed. As we have stated ad nauseam, the defendants were required to provide the same level of protection to each of its citizens, absent acceptable reasons for

providing different classes of its citizens with a lower level of protection. Counsel's assertion that there is no case law to support such a conclusion is incredible. There is abundant case law, as cited in our prior opinion, bearing substantial "factual correspondenct" to this case. Applying "general, well developed legal principles", the individual defendants should have been well aware that, it they failed to provide the decedent with the same protection they would have provided another individual outside of her class, they would be violating the decedent's rights under the Equal Protection Clause of the Fourteenth Amendment. Kovats, et al. v. Rutgers University, et al., Nos. 86-5413 and 86-5506, slip op. (3rd Cir. June 30, 1987); see also, Anderson v. Creighton, et al., No. 85-1520, slip op. (U.S. June 25, 1987).

As to the municipal defendant's assertion that it is allowed to assert a "form" of qualified immunity, we reject this argument as well. There is no authority for the propositions that a munici[a]l government such as the City of Allentown may avail itself of this defense. The defense of "qualified immunity" may only be utilized by government "officials" sued in their individual capacities, not by the government itself. Further, even if the City could assert the defense of qualified immunity, it would not be entitled to such immunity in this case for the same reasons that we have concluded that the individual defendants are not entitled to such immunity.

Finally, we fail to see why counsel for the defendants rehashes his arguments regarding the training the City provides its officers.

We granted the City summary judgment as to the plaintiff's "failure to train" theory. Thus, the plaintiff may recover against the City only if he convinces a jury that the City had adopted, either expressly or by acquiescence, a policy or custom of unlawfully discriminating against women or those who file domestic complaints.

III. Certification Pursuant to §1292(b)

Both parties have requested, as stated earlier, that we, in one or more circumstance, certify our decision for appeal pursuant to 28 U.S.C.A. &1292(b) (West 1987). We decline to do so at the present time. As noted by defense counsel, the individual defendants, under Mitchell v. Forsyth, 472 U.S.___, 105 S.Ct. 2806, 86 L.Ed2d 411 (1985), may, if they so choose, immediately appeal our Order

denying summary judgment on the grounds of qualified immunity as to the plaintiff's equal protection claim. If they, in fact, appeal our decision, we will at that time reconsider the question of whether we should certify for appeal any or all of our decision granting in part and denying in part the defendants' motion for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD DUDOSH, Administrator of the Estate of KATHLEEN DUDOSH	
	CIVIL ACTION NO:
v.	85-4066
CITY OF ALLENTOWN, DEAN SCHWARTZ and DANIEL WARG	

ORDER

TROUTMAN, S.J.

AND NOW, this 15th day of May, 1987, upon consideration of the defendants' motion for summary judgment, the plaintiff's response thereto and the memoranda of law submitted by the parties in support of their respective positions, IT IS ORDERED that said motion is GRANTED IN PART and DENIED IN PART in accordance with the attached Memorandum of Law.

/S/ E. Mac Troutman
S.J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD DUDOSH, Administrator of the Estate of KATHLEEN DUDOSH	:	
	:	CIVIL ACTION
v.	:	NO. 85-4066
CITY OF ALLENTOWN, DEAN SCHWARTZ and DANIEL WARG	:	

MEMORANDUM AND ORDER

TROUTMAN, S.J.

The above captioned action was previously before this Court pursuant to the defendants' motion to dismiss the plaintiff's complaint for failure to state a claim upon which relief could be granted. We granted said motion in part and dismissed the plaintiff's pendent state law claims against the City of Allentown in their entirety. We also dismissed

the plaintiff's state law claims against the individual defendants Schwartz and Warg for any "negligent acts and/or omissions" that they may have committed. See Dudosh v. City of Allentown, 629 F. Supp. 849 (E.D. Pa. 1985). We denied the defendants' motion insofar as it sought dismissal of the plaintiff's §§1983 and 1985(3) civil rights claims, 42 U.S.C.A. §§1983 and 1985(3) (West 1981), and his pendent state law claim against the individual defendants alleging that their actions constituted "actual malice or willful misconduct" on their part, Id.

Presently before us is the defendants' motion for summary judgment. We may grant the motion

only if there is no genuine issue as to any material fact and the defendants are entitled to a judgment as a matter of law. Federal Rule of Civil Procedure 56(c). As we previously stated in General Sound Telephone Co., Inc. v. AT&T Communications, Inc., No. 85-5833, slip op. (E.D. Pa. March 2, 1987)

> It is now quite clear that as to issues on which the nonmoving party bears the burden of proof, Summary judgment may be granted where the moving party demonstrates that there is an absence of proof to support the nonmovant's claim or defense. Celotex Corp. v. Catrett, 477 U.S. _____, 106 S. Ct. (2548), 91 L. Ed. 2d (1986). Stated in another way, there is no genuine issue of material fact in dispute if there is insufficient evidence to establish a claim or defense.
>
> When such an argument is made by the moving party, it is the responsibility of the proponent of the claim or defense to demonstrate to the Court that there is

sufficient evidence available from which a jury might return a verdict in his favor under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. ____, 106 S. Ct. (2505), 91 L. Ed. 2d 202 (1986); Bushman v. Halm, 798 F. 2d 651 (3d Cir. 1986).

Moreover, the evidence relied upon must be examined in light of the proponent's evidentiary burden at trail. In other words, the Court is obliged to measure the evidence available to defeat the summary judgment motion against the standard to be applied by the jury at trial, whether it be preponderance of the evidence, clear and convincing evidence, or some other standard imposed by the substantive law which governs the issue. Id.

Thus in determining whether there are factual issues for trial, the Court must examine the record in light of the elements necessary to establish the claim or defense in question and in light of the standard under which the jury will be required

> to consider the evidence. Only those issues essential to the claim or defense can possibly be material and such issues can be in dispute only in the nonmovant can point to sufficient conflice in the evidentiary sources listed in Fed. R. Civ. P. 56(c) and (e) such that a jury's resolution of the issues is required. The nonmovant may not conjure a genuine issue of material fact by relying upon the allegations of the complaint alone or by relying upon evidence that is merely colorable rather than significantly probative, Anderson, 91 L. Ed. 2d 212.
>
> On the other hand, the Court is precluded from considering credibility or weight of the evidence and from drawing its own inferences from the evidence. Id. at 216.

Id. at 3; see also, Chipollini v. Spencer Gifts, Inc., No. 85-5573, slip op. (3d Cir. March 19, 1987); J. E. Mamiye & Sons, Inc. v. The Fidelity Bank, No. 86-1455, slip op. (3d Cir. March 6, 1985) (Becker, J., concurring); and Equimark

Commercial Finance Company v. C.I.T. Financial Services Corporation, No. 86-3478, slip op. (3d Cir. March 2, 1987). In other words, all inferences from the evidence must be drawn in favor of the nonmoving party. With these precepts in mind, we proceed to examine the merits of the defendants' motion.

I. The Facts.

The parties essentially do not dispute the facts of this case. The are as follows: In July of 1984, a man named Richard P. "Tex" Miller assaulted the plaintiff's decedent, Kathleen Dudosh, allegedly to an extent that she required hospitalization. Miller assaulted the plaintiff again in her hospital room. The Allentown Police Department did not

receive a report of either incident.

On October 19, 1984, the deceased obtained a temporary Protection-from-Abuse (PFA) order from the Court of Common Pleas of Lehigh County of the Commonwealth of Pennsylvania pursuant to 35 Pa. C.S.A. §10181-10190 (Purdon's Supp. 1986). The deceased, in her petition for the temporary PFA order, stated that she and Miller had resided together for approximately two and one-half years, though they were not married. She futher alleged in the petition that on October 10, 1984, Miller threatened to kill her and "anyone who got in his way"; that he had a drinking problem and had been hospitalized many times for

alcohol abuse; that in October, 1984 Miller "pushed" the deceased, "hit her around", "smashed her furniture and made several threats to kill" himself and her; that on another occasion in October, 1984, Miller "beat up" the deceased two days in a row, requiring her hospitalization for "two weeks", during which Miller assaulted her again; and that in August, 1984, Miller "choked her so hard that he lifted her off the ground two feet while heavily drunk". (Defendants' Motion for Summary Judgment, Paper #15, Ex. E.) The Allentown Hospital records contained in the record before us, however, reflect that the deceased was admitted to the hospital on July 18, 1984, and was apparently

discharged the following day. The records list her "admitting diagnosis" and "depressive disorder". (Id. at Ex. B). While the records do mention complaints by the decedent that Miller had assaulted her, nowhere do the hospital records refer to any physical injuries which required that she be hospitalized. More importantly, the plaintiff has presented no evidence that any of the incidents described in the petition were ever reported to the Allentown police.

On the same day, i.e., October 19, 1984, at 5:11 P.M., the Allentown Police Department received a report of an "unwanted

person" at the apartment building where the decedent resided. The complaint had been filed by a "concernined neighbor who heard what she believed to be a disturbance between the (decedent) and Miller". (Defendants' Motion for Summary Judgment, Paper #15, Ex. G.). The decedent informed the Allentown police officer who responded to the call that there was no problem. (Id.; see also, deposition of Daryl Hendricks, plaintiff's response to defendants' summary judgment motion, Paper #16, Appendix (hereinafter, simply "Appendix") IV).

On October 20, 1984, at 1:30 P.M., the Allentown Police Department

received a report of an "unwanted person" at the decedent's residence. Upon the patrolman's arrival, the decedent exhibited the temporary PFA order she had obtained the prior day and informed the officer that Miller had appeared at her apartment door the previous night in an intoxicated state. She stated that she had allowed him to sleep there, but called the police when he did not wake up and leave. The patrolman told Miller to leave and he complied. (Defendants' Motion for Summary Judgment, Paper #15, Ex. H; see also, deposition of Joseph Stauffer, Appendix III, pp. 3-5).

On November 21 and December 7, 1984, the Allentown police were again

called to the deceden's apartment. On both occasions, Miller was again removed from the scene without arrest. (Defendants' Motion for Summary Judgment, Paper #15, Exs. I and J).

On December 9, 1984, a neighbor of the decedent who resided in the same apartment building reported a "prowler" to the Allentown police. The patrolman who responded to the call learned upon arrival that the "subjects" reported on the fire escape of the structure resided in the building and were using the fire escape due to a "10-40" sleeping in the "breesway (sic)". (Defendants' Motion for Summary Judgment, Paper #15, Ex. K;

see also, deposition of Thomas Houck, Appendix IV, pp. 3-15). The patrolman arrested the "10-40", i.e., Tex Miller, transported him to the Allentown Police Headquarters and cited him as a "public drunk". (Id. at Ex. L.).

On January 21, 1985, the Lehigh County Court of Common Pleas made the temporary PFA order a permanent order of the court. (Plaintiff's Complaint ¶15, and Defendants' Answer, ¶15). The order directed Miller to refrain from abusing or threatening to abuse the decedent and not to go near her residence. The court further ordered that copies of the order be served upon the Allentown Police Department as well as Miller, and that if Miller violated the order

he could be found in violation of Protection From Abuse Act and/or in indirect criminal contempt of the court. (Plaintiff's Supplemental Memorandum of Law to Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss, Paper #7, Ex. A); see also, Dudosh v. City of Allentown, 629 Supp. at 845, n. 7.

On January 24, 1985, at 1:49 P.M., the deceased filed another report of an "unwanted person" at her residence with the Allentown Police Department. Miller was again sent on his way, but he was not arrested. (Defendants' Motion For Summary Judgment, Paper #15, Exs. M and N; see also, deposition of Michael S. Popovich, Appendix IV, pp. 3-6).

On January 25, 1985, at 3:58 A.M., the individual defendant Warg transported the decedent to "Turning Point", a non-profit organization providing social services to abused spouses. Warg stated in his report that the decedent informed him that Miller was knocking on her door and driving around the block. Warg did not see Miller in the area. (Defendants' Motion for Summary Judgment, Paper #15, Ex.P; see also, deposition of Daniel Warg, Appendix VI, pp. 31-39).

On January 25, 1985, at 9:15 A.M., the decedent filed a complaint with the Allentown Police that Miller was following and harrassing her. The reporting officer noted the PFA order against Miller, and stated that Miller could not be located in the area. (Defendants' Motion for Summary Judgment, Paper #15, Ex. Q; see also, deposition of Carl W. Held, Appendix III, p. 9).

On January 26, 1985, the Allentown police received another report of an "unwanted person" from the deceased, who reported that Miller was at her residence harrassing her. Once again, the responding police officer could not locate Miller following a search of the area. (Id. at Ex. R). Later that same day, however, Miller was arrested for indirect criminal contempt pursuant to the PFA order when he was found on the front porch of the decedent's dwelling. He was committed to the County Prison. (Defendants' Motion for Summary Judgment, Paper #15, Ex. S; see also, deposition of Donald Wayne Leauber, Appendix II, pp. 7-9). The record does not disclose the disposition of the charge.

On March 17, 1985, the Allentown police received a report of an "unwanted entry" into the decedent's residence from Kathleen Dudosh. The report filed by the

responding officer, Balliet, states that, "(Miller) has threatened to kill the complainant and everyone that lives with her in her apartment". (Defendants' Motion for Summary Judgment, Paper #15, Ex. U). The reporting officer noted that the decedent possessed a PFA order against Miller. Finally, he reported that, "complainant states that she is afraid that the suspect will come back and try to make good his threats. The suspect also left a note on the complainant's mail box that said (next)". (Id.; see also, deposition of James Balliet, Appendix II, pp. 4-8, 10 and 16). (Parentheses in original).

The record before us indicates that a copy of Balliet's March 17 report was forwarded to the Allentown Police Department's Detective Bureau. The report filed by the detective who received the patrolman's report states the following:

> This office did not further follow up investigation on this matter because of the above facts. It has been our policy not to get involved in matters of this nature. Usually the parties are told to bring private prosecution because most times they get back together after the incident causing the separation. This fact was verified during the investigation in incident 85-16022 on 28 March 1985, when neighbors showed that Mr. Miller had been with Miss Dudosh on a number of occasions since the abuse papers were served. On a number of occasions he had stayed with Miss Dudosh overnight.

(Id.) (Emphasis added). The detective did not file this report, however, until March 29, 1985, the day after Miller murdered the decedent. The detective testified in his deposition that he received a copy of the report, filed by Balliet on Sunday, March 17, the following day, Monday, March 18, when his shift began at 3:00 P.M. and he picked up all the reports in the Detective Bureau's "bin". He stated that following the decedent's murder, his superiors asked him why he had performed no follow-up work on the

report filed by Balliet. In response to the inquiry, he filed the March 29 report partially quoted above. The detective also explained in his deposition that the "policy" of not getting involved, referred to in his report, was not a policy adopted by the Allentown Police Department in general, but rather, was a policy followed by the Detective's Bureau. He testified that the Bureau "did not get involved in any domestic cases ..., unless there was physical abuse or physical harm naturally then like aggravated assault. Other than that they would advise the sift, the uniform (sic) who handled any of those complaints". (Appendix IV, deposition of James McCurley, Jr., p. 9).

On March 28, 1985, Miller shot and killed the decedent and then committed suicide. The decedent had on that date again contacted the Allentown Police Department to request their assistance when Bell, the individual who lived in the

apartment below the decedent, informed her that Miller had entered Dudosh's apartment through a window at the top of a fire escape on the side of the building. (Appendix VIII, deposition of Arlene Bell, p. 11). The individual defendants responded to the decedent's call for help. Upon their arrival the decedent was standing in front of the apartment building. The trio, after the decedent handed Warg a copy of the PFA order, proceeded to ascend the stairs to the second floor of the apartment building where the entrace to the decedent's apartment was located. Arlene Bell testified that prior to the three ascending the stairs, the decedent asked her whether Miller was "still up there". (Id.) Bell testified that she responded, "Yes, he is still up there", to which the decedent responded, "Well, I have two police officers with me to go upstairs". (Id.) Bell testified that she then told the decedent, "You are

going to be killed", "they can't do anything to protect you", "Don't go up. Stay down here and let them go up". (Id.) Bell explained, however, that when she said, "You are going to be killed", she didn't mean with a gun, but rather, "physically, because he used to beat her". (Id.) She also testified that in response to her invocations not to go upstairs, the decedent stated, "No; I can talk to him . . . I can handle him". (Id.) Both Schwartz and Warg testified in their depositions that they did not hear any of this conversation. (See Appendix V, deposition of Dean Schwartz, p. 34, and Appendix VI, deposition of Daniel Warg, pp. 50-52). Nor has the plaintiff adduced any evidence whatsoever that would tend to contradict their testimony on this subject. At no time did Schwartz and/or Warg direct the decedent to remain outside or prevent her from accompanying them upstairs. It is also clear that the

individual defendants did not force the decedent to accompany them to her apartment. The only inference that may be drawn from the record is that the decedent willingly and of her own volition escorted the police officers to her apartment.

Upon arriving at the apartment's entrace, the decedent unlocked the door. The door was swung open. Officer Schwartz yelled, "He has a gun". Schwartz stepped back from the doorway. Miller entered the doorway and fired a single shotgun blast into the chest of the decedent. Miller withdrew into the apartment. The individual defendants withdrew down the stairway. Miller at some point shortly thereafter committed suicide by firing the same shotgun he had used to kill the decedent into his own chest. (See Appendix V, deposition of Dean Schwartz; Appendix VI deposition of Daniel Warg; and Appendix VIII, deposition of Arlene Bell).

The Plaintiff in his complaint, as administrator of the decedent's estate, sets forth three primary legal theories upon which he contends that he is entitled to recovery against the defendants. The plaintiff first asserts that the individual defendants deprived the decedent of her constitutional rights under the Due Process Clause of the Fourteenth Amendment. He next contends that the individual defendants deprived the decedent of her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. The plaintiff's Equal Protection claim is accompanied by an assertion that the individual defendants conspired to deprive the decedent of her right to equal protection of the laws in violation of the 42 U.S.C.A. §1985(3) (West 1981). The plaintiff premises the liability of the municipality for the alleged deprivation of the decedent's constitutional rights upon

two theories, both, of course, under 42 U.S.C.A. §1983 (West 1981). The first is that the individual defendants acted pursuant to a "policy" approved, encouraged and acquiesced in by the City of Allentown. The second is that the City's alleged non-existent or grossly inadequate rules, regulations or procedures and its failure to properly train the individual defendants resulted in the deprivation of the decedent's Fourteenth Amendment rights to due process and equal protection. The plaintiff's third and final theory of recovery is contained in a pendent state law claim in which he asserts that the individual defendants should be held liable for the decedent's death because they intentionally, willfully and wantonly failed to protect the decedent because of her sex such that their actions constituted actual malice or willful misconduct on their part. We shall address the defendants' motion for

summary judgment as to each of the plaintiff's claims seriatim.

II. The Motion.

A. The Due Process Claim.

In our memorandum denying the defendants' motion to dismiss the plaintiff's claim that the individual defendants deprived the decedent of her Fourteenth Amendment due process rights by failing to provide her with adequate police protection, we concluded, relying heavily upon the Third Circuit Court of Appeals' decision in Estate of Bailey By Oare v. County of York ("Bailey"), 768 F. 2d 503 (3d Cir. 1985), that we could not say as a matter of law that the plaintiff could prove no set of facts upon which a jury could conclude that the individual defendants deprived the plaintiff's decedent of her due process rights. We premised our ruling on the belief that the plaintiff had alleged in his complaint sufficient facts upon which a "special

relationship" could be found to have existed between the defendants and the decedent, thereby vesting in the decedent a constitutional right to adequate police protection. See Dudosh v. City of Allentown, 629 Supp. at 855. Presently before us, however, is a motion for summary judgment. The burdens upon the parties in this context at variance with the burdens they faced in the context of a motion to dismiss for failure to state a claim need not be discussed since they are apparent by comparision of our earlier opinion and our discussion above as to the standards we are required to apply in disposing of a summary judgment motion.

Subsequent to our decision on the defendants' motion to dismiss, we became aware of a number of additional cases which we believe merit as to the plaintiff's due process claim.

The Seventh Circuit Court of Appeals in

Walker v. Rowe, 791 F. 2d 507 (7th Cir. 1986), was faced with a due process claim similar to that asserted by the plaintiff here. In Walker, prison guards and the estates of deceased guards brought actions against officials of the Illinois Department of Corrections claiming that the defendants had deprived the injured and deceased guards of their due process rights by failing to provide them with safe working conditions. In rejection the plaintiffs' claims, the court stated that:

> The defendants did not kill or injure the guards; prisoners did, and this makes all the difference. (citation omitted) To see why, consider the language of the due process clause of the (F)ourteenth (A)mendment, on which the guards rely: '(N)or shall any State deprive any person of life, liberty or property without due process of law . . .' The constitution . . . is a constraint on the state's power to act, a prohibition on the misuse of official power. (citation omitted) It does not require the state to guarantee life, liberty or property against invasion by private actions . . .

> 'Due process' does not mean 'due care'. Davidson v. Cannon, _____U.S._____, 106 S. Ct. 668, 670, 88 L.Ed.2d 677 (1986) . . .
>
> The level of safety to be provided by the police to the people . . . is determined by political and economic forces, not by juries implementing the due process clause.

792 F. 2d at 509. (Emphasis in original).

The First Circuit Court of Appeals in a case even more analogous to the case sub judice similarly stated that:

> The (F)ourteenth (A)mendment . . . does not protect against the deprivation of life by any person at all but only against the deprivation of life by the state without due process. Where, as in these circumstances, the victim dies at the hands of a private individual who was neither an agent of the state nor employed by the state, can it be said that the state deprived her of life without due process? If not, there was no violation of the (F)ourteenth (A)mendment, even though the failure of state officials to protect the victim contributed to her death.

Estate of Gilmore v. Buckley, 787 F. 2d 714, 719 (1st Cir. 1986), cert. denied, 107 S. Ct. 270, 93 L. Ed. 2d 247 (1986); see also Williams v. City of Boston, 599 F. Supp. 363 (D. Mass. 1984), affirmed, 784 F. 2d 430 (1st Cir. 1986); Archie v. City of Racine, 627 F. Supp. 766 (E.D. Wis. 1986); and Bernstein v. Lower Moreland Township, 603 F. Supp. 907 (E.D. Pa. 1985).

The theme of the cases cited above is that the Fourteenth Amendment's Due Process Clause does not impose upon the states an obligation to provide their citizens with public services, more specifically, adequate police protection. Concomitant with this theme is the general rule of law that a state, or a political subdivision thereof, cannot be held liable under the Due Process Clause, through §1983, for its failure to provide such protection. See, Dudosh v. City of Allentown, 629 F. Supp. at 583. As with most, if not all,

rules of law, however, there are exceptions to the general rule.

The Third Circuit Court of Appeals in Bailey, supra, stated that the existence of a "special relationship" between the state and a private individual may place upon the state an affirmative obligation to protect that individual.[1] The Seventh Circuit Court of Appeals has quite appropriately stated that, "The countours of what constitutes a "special relationship" between a municipality, acting through its officials,

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[1] We hasten to add at this point that the "special relationship" described by the Third Circuit in Bailey is in no way based upon some motion of a common law tort duty akin to that which might serve as the basis of a negligence action; rather, the "special relationship", and the obligations placed upon the state where such a relationship exists, are strictly of a constitutional magnitude.

and its citizens are hazy and indistinct." Ellsworth v. City of Racine, 774 F. 2d 182, 185 (7th Cir. 1985), cert. denied, 106 such a "special relationship" did exist, based on the allegations of the complaint, between a child murdered by her mother and a third party and the defendant county.[2] The Seventh Circuit Court of Appeals reached the same conclusion in White v. Rochford, 592 F. 2d 381 (7th Cir. 1979). In that case, the police arrested the driver of a car containing three children passengers on the Chicago Skyway

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[2] But see, DeShaney v. Winnebage County of Social Services No. 86-2188, slip op. (7th Cir. February 12, 1987) in which the Seventh Circuit rejected the Third Circuit's reasoning in Bailey in an identical case.

in the actions of the police violated the due process clause as undue incursions on the personal security of the children and as a state activity which "shocks the conscience", since the police could not avoid knowing the dangers to the children from the cold weather, the traffic and their actions. As stated by the same Circuit Court in a different case,

> If the state puts a man in a position of danger from private persons and then fails to protect him, it is as much an active tortfeasor as if it had thrown him into a snake pit.

Bowers v. DeVito, 686 F. 2d 616 (7th Cir. 1982) (Emphasis added).

Here, the plaintiff alleges in his complaint and asserts in his memorandum in opposition to the defendants' motion for summary judgment that the individual defendants "took" the decedent upstairs to her apartment

and "instructed" her to open the apartment's door and to enter before them while they stood back from the entranceway. (See Plaintiff's Complaint, ¶22, and Plaintiff's Memorandum of Law in Opposition to the Defendants' Motion for Summary Judgment, (Paper #16, p. 13). The plaintiff, however, has failed to adduce any evidence from which a jury could reasonably infer that such was the case; rather, the only inference a jury could reasonably draw from the evidence of record is that the decedent willingly accompanied the police officers to the entrance to her apartment and of her own volition opened the apartment door behind which stalked her murderer. The plaintiff has also failed to present any evidence that the decedent was in any way mentally incompetent. Thus, this does not present a case where the state placed a person in a position of danger only to abandom him.

A large part of our discussion in our prior opinion disposing of the defendant's

motion to dismiss was devoted to the relationship between the decedent and the defendants, as alleged in the plaintiff's complaint. Based on the evidentiary record before us and further analysis of the Third Circuit's opinion in Bailey, we do not reach the same conclusion as we did in our prior opinion, i.e., that a "special relationship" of a constitutional dimension existed between the decedent and the defendants, such that a failure by the defendants to adequately protect the decedent from Miller constituted a deprivation of her substantive due process rights.

The "special relationship" rule has its genesis in the Supreme Court's decision in Martinez v. California (Martinez), 444 U.S. 277, S. Ct. 553, 62 L. Ed. 2d 481 (1980). In Martinez, the plaintiffs alleged that the defendant state officials had deprived their decedent of her life without due process of law by releasing a parolee, a mentally

disturbed, convicted sex offender, who had been imprisoned with a recommendation that he not be paroled, when the state officials knew or should have known that his release created a clear and present danger that he would commit another violent crime, viz., the murder of the plaintiffs' decedent, a fifteen year old girl. In sustaining the state trial court's dismissal of the plaintiffs' §1983 action, the Supreme Court concluded that the defendant state officials did not "deprive" the decedent of her life within the meaning of the Due Process Clause and that the victim's death was too remote a consequence of the parole officers' action to hold them responsible under §1983. The Supreme Court also stated that it need not and did not decide whether a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the paroling of a prisoner. 62 L. Ed. 2d at 489.

Subsequent similar cases have required lower courts to tangle with the issue of which side of the Martinez "line" the facts of that particular case fell on. In Bailey. the Third Circuit concluded that the facts of that case lay on the side of the line opposite of Martinez and on the side of a constitutional violation. As might be expected, the plaintiff in this case relies heavily upon the Third Circuit's statement in Bailey that, "The significant difference between this case (i.e., Bailey) and Martinez is the fact that the victim in Martinez was a member of the public at large while here the agency was aware of a 'special danger' to his deceased daughter from a particular individual, his decedent possessed a "special relationship" with the defendants akin to that found in Bailey. It appears that the Third Circuit's statement in Bailey quoted in the prior

sentence, and the plaintiff's argument, are based upon the Supreme Court's observation in Martinez that, "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger". 62 L. Ed. 2d at 489. It is clear in this case that the defendants were or should have been aware of a special danger to the deceased from a particular individual. As we stated in our prior opinion,

> the deceased was not just a member of the public at large who through fate and misfortune becomes a victime of crime in a situation over which the police had no control or notice. She was a specific individual who had been subjected to particularized assaults and threats of murder.

Dudosh v. City of Allentown, 629 F. Supp. at 855. Nevertheless, we believe that to conclude that a "special relationship" of a constitutional dimension existed between the decedent and the defendants based on this rationale alone would be to read too much

into the Supreme Court's opinion in Bailey. As stated by the Third Circuit in Bailey, the defendant county, through its employees, had removed the child from the home, taken her into custody, placed her in the protective custody of another relative, and then returned her to the custody of her mother. Thus, it could be said that the state, having removed the child rom the "snake pit" once, simply threw her back into the same pit. Further, the court stated that where an agency knows that a child has been abused, "this strengthens the argument that some sort of special relationship had been established". Bailey, 768 F. 2d at 511, quoting Jensen v. Conrad, 747 F. 2d 185, 195 n. 11 (4th Cir. 1984), cert. denied, _____ U.S. _____, 105 S. Ct. 1754, 84 L. Ed. 2d 818 (1985) (Emphasis added). We find it significant that the Third Circuit did not state that such knowledge was of exclusive importance; rather, it appears that it was just one of many factors which the

court relied upon in concluding that the plaintiff had alleged sufficient facts upon which a "special relationship" could be found to have existed between the decedent and the defendants. Cf. Escamilla v. City of Santa Ana, 606 F. Supp. 928, 931 (C.D. Cal. 1985), affirmed, 796 F. 2d 266 (9th Cir. 1986) ("constitutional duty arises only when the persons acting under color of state law have created a special or custodial relationship or are aware of a special danger with respect to a particular victim"). (Emphasis added).

We do not believe that such knowledge on the defendants' part in this case, by itself, can alone be a basis for a finding of a special relationship of a constitutional nature. Had the plaintiff adduced facts in support of his allegations that the individual defendants indeed "took" the decedent to the apartment door and "instructed" her to open the door and enter before them while they stood back from the entraceway, our analysis, and most

likely our conclusion, would have differed. Such action, combined with the defendants' knowledge of Miller's threats to and assaults of the plaintiff's decedent, and his prior weapons violation, might very well have created a "special relationship" analogous to that found in Bailey. However, we need not and do not decide this question, since the plaintiff has completely failed to support his allegations of such conduct by the individual defendants.

Whether it is expressed in terms of a lack of a constitutional duty to protect the decedent on the defendants' part or a lack of proximate cause between the defendants' conduct and the decedent's loss of her life, the individual defendants' condut did not rise to the level of a deprivation by the defendants of the decedent's right to due process. We believe that to hold otherwise would recognize the fear expressed by Judge Adams in his dissent in Bailey that §1983

was becoming a federal tort claims act. As stated by Judge Adams,

> §1983 was enacted to deal primarily with acts of discrimination by state officials. There is a danger that by extending this important legislation to contexts far removed from Congress' original and overarching purposes a national state tort claims act administered in the federal courts in effect will be created. Steps in that direction should not be lightly taken sin-e the ultimate outcome of such a course might well be incongruent with our role as federal judges. When a court extends a statute far beyond what was contemplated by Congress, it transgresses the separation of powers.[3]

Bailey, 768 F. 2d at 513 (Adams, J., dissenting).

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[3] In citing Judge Adams's dissent, we do so fully cognizant of the fact that we are obligated to follow the rule of law estabilshed by the majority of the panel in Bailey. We do not believe that our decision today in any way violates that obligation.

The First Circuit Court of Appeals succinctly expounded on Judge Adam's fear when it stated that,

> A contrary dispostion of the plaintiffs' claim would 'trivialize' the Fourteenth Amendment by making every negligent act by a state officer that caused physical injury a constitutional violation. The Supreme Court has rejected reasoning that 'would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the State'. Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 41 L. Ed. 2d 405 (1976).

Williams v. City of Boston, 784 F. 2d at 434. Further, and most importantly, the Supreme Court itself has stated that the "Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss or injury to life, liberty, or property", Daniels v. Williams, ___ U.S. _____, 106 S. Ct. 662, 664, 88 L. Ed. 2d 662 (1986), since

a "lack of due care simply does not approach the sort of abusive government conduct that theDue Process Clause was designed to prevent", Davidson v. Cannon , ____ U.S. _____, 106 S. Ct. 668, 669, 88 L. Ed. 2d 677 (1986).

The facts adduced by the plaintiff demonstrate that, even assuming a constitutional duty to protect the decedent existed, which we have concluded it did not, the conduct of the individual defendants was, at most, negligent. Based on the foregoing discussion, the cannot, therefore, be deemed to have violated the decedent's Fourteenth Amendment right to due process. Nor can the fact that the Commonwealth of Pennsylvania, through its Legislative, has chosen to immunize the defendants for such conduct, i.e., negligent acts and/or ommissions, under

the State's own tort law. alter our decision.[4]

For these reasons, we must grant the defendants' motion for summary judgment as to the plaintiff's Due Process claim.[5]

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[4] We find it ironic that a statute, viz., Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §§8541-8559 (Purdon's 1982), which protects the defendants from liability from state law negligent tort claims at the same time perhaps precludes them from ever absolving themselves of the allegations made against them. With this possibility in mide, we emphasize that we express no opinion, positive or negative as to the propriety of the defendants' conduct. Our statement above that the individual defendants' conduct was, at most, negligent, should not be interpreted as a conclusion on our part that their conduct was, in fact, negligent.

[5] Based on our decision above, we need not and do not address the individual defendants' secondary argument that they cannot be held liable for any deprivation of the decedent's due process rights on the ground that they are entitled to "qualified immunity" since the constitutional right was not clearly established at the time of the decedent's death, See, e.g., Mitchell v. Forsyth, 472 U.S. ____, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

B. The Equal Protection Claim.

i. The merits of the claim.

The defendants have also moved for summary judgment as to the plaintiff's denial of the equal protection claim asserted under both §§1983 and 1985(3). Unfortunately, counsel for both parties have largely failed to address the major points on this issue and we, as a result, have been left unaided by their memoranda in support of their positions.

To establish his denial of equal protection claim, the plaintiff must prove that the individual defendants intentionally discriminated against the decedent by failing to accord her the same amount of police protection they would have provided another member of the community not within the decedent's "class". The exact nature of the class-based discrimination alleged by the plaintiff is not clear even now. If it is his contention that the individual defendants

failed to protect his decedent because of her sex, i.e., that the individual defendants would have accorded a man better protection, then the defendants must articulate an important government interest for doing so. See, e.g., Bartalone v. County of Berrien, 643 F. Supp. 574 (W.D. Mich. 1986); Lowers v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). They have not attempted to articulate such a compelling reason. nor do we believe it is possible for them to do so. If it is the plaintiff's contention that the individual defendants failed to protect his decedent because she had filed a domestic complaint or because she knew her attacker, i.e., that the defendants would have afforded an individual who did not know her attacker or who had filed a non-domestic complaint better protection, then the defendants must articulate a rational reason related to a legitmate government purpose for doing such since no suspect classification or

fundamental right is involved. Once again, they have not attempted to articulate such a rational reason. See, e.g., Thurman v. City of Torrington, supra. As stated by the district court in Bartalone v. County of Berrien, supra,

> "The (E)qual (P)rotection (C)lause of the (F)ourteenth (A)mendment guarantees to every person within the United States the right to equal protection of the laws. U.S. Const. Amend 14. This clause applies to the activities of police agencies, and protects persons from irrational discrimination in either acts of commission or omission...Police officials cannot refuse to protect a particular class of persons, when under the same or similar circumstances they would protect others, without a rational reason for doing so."

643 F.Supp. at 576-577. Although as stated earlier, there is no general constitutional right to police protection, adequate or otherwise, the state may not, when it chooses to do so, discriminate in providing such services.

Examining the record before us, we believe that the plaintiff has adduced enough evidence from which a juror could reasonably conclude that the individual defendants discriminated against the decedent, either on the basis of her sex or the nature of her complaint, in the manner in which they handled her request for assistance. The depositions of various members of the Allentown Police Department contain numerous statements from which such an inference could be made. For example, Gerald Monaghan, Assistant Chief of the Allentown Police Department, at his deposition, testified in part, as follows:

> "Q....Now, if you received a call for an unwanted person and it turned out that the person was not known by the property owner or the complainant would the manner of apprehension, would the manner of treatment towards the safety of the property owner differ?
>
> A: It wouldn't be an unwanted person in that case it would be a burglar.

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sion and the safety considerations for the property owner differ?

A: In that case that would come in or it would be perceived as a felony in progress.

Q: Tell us the difference in procedure.

A: Our policeman as I think I explained before would proceed with extreme caution, may or may not have the guns drawn and probably would be prepared or perhaps anticiptate the worst case scenario.

Q: What safety considerations would be employed for the protection of the property owner in that situation?

A: In a situation like that with the felon unknown to the complainant, we would approach the building alone.

Q: You would not allow the property owner to go up to the door, open the door and be exposed to the intruder?

A: No.

Deposition of Gerald Monaghan, Appendix, I, pp. 13-15).

Samuel Solivan, a patrolman with the Allentown Police Department, testified in a similar vein in the context of questioning regarding his investigation of an incident

apartment. The following excerp illustrates the thrust of the relevant testimony:

> "Q: Are you aware of whether he was ever pursued and arrested as a result of that incident?
>
> A: No, he was not because if he was I would have been the arresting officer.
>
> Q: Now why wouldn't he have been arrested?
>
> A: Why wouldn't he have?
>
> Q: Yes, if he broke into the apartment in violation of the order.
>
> A: I don't know. Probably because we couldn't find him. On my incident we couldn't find him. We checked his residence and we had a description of the car and we just couldn't find him.
>
> Q: That night?
>
> A: Yes, precisely.
>
> Q: But you could have issued a warrant and then picked him up subsequently?
>
> A: I guess we could have.
>
> Q: For example, to compare that with a burglar who would break into an apartment and run away, that person would be pursued through arrest warrants and investigations

A: That's correct.

Q: The same policy was not in effect with respect to violators of Protection Against Abuse Orders?

A: The law is clear when it comes to criminal versus something that's more domesticated.

Q: Just to make this clear, the case in which you decided to take no further action and pursue to arrest was a situation where you determined there was evidence that he had broken into the apartment and was in violation of the order and was away when you arrived. He couldn't be found that night?

A: The only evidence I had was her word.

Q: You have on other occasions I assume in your experience as a police officer brought arrests on information received from others?

A: That's correct.

Q: That's a common way of brining an arrest; is it not?

A: If you're pretty sure the victim is going to show up for the hearing.

Deposition of Samuel Solivan, Appendix III, pp. 10-13) (Emphasis added).

The Chief of Police of the Allentown Police Department testified as follows at

Q: One further question and I'll let you go. If the police had arrived and determined there was an intruder who did not know Kathleen Dudosh, a total stranger, would that have called for any different procedures in the manner of apprehending the intruder?

A: What would have then been reported to us would not have been a domestic call but conceivable (sic) a burglary in progress. Burglarly in progress cases are handled differently then (sic) domestic calls.

Q: And how is that?

A: Well, if we suspect there's a burglary in progress the first thing we do is seal off the area where the burglarly is suspected to be in progress...There isn't any relatioship between the burglary call and a domestic all. In most burglary calls we don't know who the burglar is.

Q: And what then would be the best way to protect the person against confrontation by the intruder?

A: Just by attempting to remove them from any hazards that may be encountered. We don't allow--if it's a burglary in progress that's a police operation, and a police operation is entirely different than handling a domestic call where it's a spousal abuse-type situation. You're trying to draw a relationship between the two and that's impossible.

here, Chief, in this case.

A: Okay. I'll say this, you're trying to draw a parallel between a police operation relating to or responding to a burglary in progress and a domestic call and there isn't any relationship. Burglars are generally unknown people. Domestic disburbances we're dealing with someone who we know, at least we don't know, the complainant knows most of the time who is causing it.

Deposition of David M. Howells, Sr., Appendix V, pp. 27-30).

As stated above, we believe that a jury could, based on the evidence of record, as illustrated by the passes of deposition testimony quoted above, reasonably infer that the Allentown Police Department adhered to an administrative classification, i.e., the sex of the complainant, the nature of the complaint, or both, in the handling of requests for assistance which violated the equal protection Clause of the

Thurman v. Cityof Torrington, supra.

We hasten to addi, however, that this is not the only inference which may be drawn from the evidence of record, nor is it the inference which this Court would necessarily draw. In fairness, the record contains an equal or greater amount of evidence that the police officers of the defendant municipality provided equal protection to all of Allentown's citizens, regardless of their sex or the nature of their complaints. (See, e.g., deposition of David M. Howells, Sr., Appendix V, p. 3). It is for a jury, not this Court to weigh the evidence and reach a

6 We note that, in addition to proving that the individual defendants acted pursuant to an administrative classification which violated the Equal Protection Clause, the plaintiff will also be required to prove that the violation of the decedent's right to equal protection of the laws was a proximate cause of her death. We believe that the Plaintiff's burden in this regard will be most difficult, if not impossible, to sustain. We cannot say however as a matter of law, that the plaintiff will not be able to sustain this burden.

verdict.

ii. Qualified Immunity.

As well as arguing that they are entitled to qualified immunity as to the plaintiff's due process claim, we assume that the individual defendants assert the same argument as to the equal protection claim since they fail in their motion for summarry judgment to distinguish between the two claims. We reject this argument. The decedent's constitutional right to equal protection of the laws was probably the most clearly established constitutional right she possessed at the time of her death. Thus, it is clear that the individual defendants are not entitled to qualified immunity as to the equal protection claim See, e.g., Mitchell v. Forsyth, supra.

iii. The Liability of the Municipal Defendant.

The municipal defendant argues that

Plaintiff's equal protection claim on the ground that the plaintiff has presented no evidence upon which a reasonable juror could conclude that the individual defendants, if they indeed did deprive the decedent of her right to equal protection, acted pursuant to a municipal policy or custom established by the City, a prerequisite for the imposition of liability upon a municipality under the Supreme Court's decision in Monell v. New York City Department of Social Services. 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

The plaintiff has set forth two theories upon which the municipal defendant should be held liable. The first is that the individual defendants were acting pursuant to a policy approved, encouraged and acquiesced in by the City. Liability premised on this theory clearly satisfies the requirements of Monell. It is indeed true

the City had promulgated a written policy administratively classifying complaints received by the police department and prescribing the appropriate responses thereto. Such a written policy is not required however. A municipality may be found to have adopted a policy through silence as a result of its failure to sanction its employees for a pattern of conduct on their part of which municipal policy makers are aware. Stated in another manner, a municipality cannot "acquiesce:" in a pattern of conduct by its employees, and then be heard to say that those employees were not acting pursuant to municipal policy. See, e.g., Mariani v. City of Pittsburgh, 624 F.Supp. 506 (W.D. Pa. 1986). Here, the testimony contained in the depositions of record demonstrates that a written report was prepared each time a police officer responded to a citizen's complaint, and that the report

how the officer responded. There is testimony that these reports were submitted to and reviewed by the officer's superiors. Finally, there is testimony by at least one officer that he has never been criticized by his superiors for the manner in which he handled a complaint, including citizen complaints of a domestic nature. (See deposition of Daniel Warg, Appendix VI, p.26). Based on this testimony, we find that the plaintiff has presented enough evidence to create a genuine issue of material fact as to whether the individual defendants acted pursuant to municipal policy, a plicy created perhaps by acquiescence and thus more appropriately described as custom, such that it can be said that such policy or custom caused, i.e., was the "moving force" behind or had an "affirmative link" with, a violation of the decedent's right to equal protection. See, e.g., City of Springfield v. Kibbe, No.

(O'Connor, J., dissenting).

The plaintiff also seeks to hold the municipal defendant liable under Section 1983 based on its alleged failure to properly train the individual defendants. Such a theory of liability has proved a continuous sticking point for many districts and circuit courts.[7]

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[7] See, e.g., Hinshaw v. Doffer, 785 F.2d 1260 (5th Cir,1986); Grandstaff v. City of Borger Texas, 767 F.2d 161 (5th Cir,1985); reh'g denied, 779 F.2d 1129; Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir,1985); cert dismissed No. 85-1217, slip op. (U.S. Feb. 25,1987); Voutour v. Vitale, 761 F.2d 812 (1st Cir,1985), cert denied sub nom. Town of Suagus v. Voutour, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986); and Rymer v. Davis, 754 F.2d 198 (6th Cir, 1984) vacated and remanded sub nom., City of Shepherdsville v Rymer, 105 S.Ct. 3518 87 L.Ed.2d 646 (1985), on remand, 775F.2d 756, cert denied, 55 U.S.,L.W. 3607 (U.S. March 19, 1987) (No. 85-1192).

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Court would definitively address this issue when it granted certiorari last year in a case for the stated purpose of "resolv(ing) whether a city can be held liable under 42 U.S.C. Section 1983 for providing inadequate police training and, if so, what standard should govern the imposition of such liability." Id. at 1 Unfortunately, the Supreme Court subsequently dismissed the writ as having been improvidently granted. Id.; see also., Oklahoma City v Tuttle, 471 U.S. ___, 105 S.Ct. 8427, 85 L.Ed.2d 791, 804 n.7 (1985). Further, our own Circuit Court has failed to definitely address this precise question. See, e.g., Freedman v. City of Allentown, 651 F.Supp. 1046 (E.D., PA 1987).

The District Court for the Western District of Pennsylvania, in Mariani v. City of Pittsburgh, supra, was squarely faced with the issue of whether "inadequate training" could serve as a "policy or custom" sufficient to impose Section 1983 liability

the defendant municipality's summary judgment motion assumed, without deciding, that such a claim stated a viable cause of action, but found that the plaintiff had failed to adduce a genuine issue of material fact both as to whether the policy or custom of inadequate training had "caused" the plaintiff's deprivation of his constitutional rights. The same court in Sewell v. Dever, 581 F.Supp. 556 (W.D. Pa. 1984) similarly concluded that the plaintiff had adduced no evidence that the defendant municipality had inadequately trained its police officers in a manner which a juror could reasonably conclude was in reckless disregard for or with deliberate indifference to the rights of citizens. As noted by Justice O'Connor in her dissent in Kibbe, supra.,where a plaintiff does not assert that the municipality "authorized" the conduct, but rather contends that the methods taught in the city's training

had better trained its police officers the unconstitutional conduct would not have occurred, "the causal connection between the municipal policy and the constitutional violation is an inherently tenuous one." Id. at 9.

Here, counsel for the plaintiff elicited a number of statements from Allentown police officers either that they had not received or could not recall receiving any training prior to the decedent's death specifically dealing with the handling of domestic complaints. A number of officers, incl;uding supervisory personnel, also testified that the handling of such situations was left largely to the "discretion" of the individual officer responding to the call. The plaintiff, however, in response to the defendants' motion for summary judgment, has failed to present any evidence whatsoever, expert or otherwise, that the individual defendants were, in fact, inadequately

specific instructions on the handling of domestic complaints. At a minimum, the plaintiff was required to present some evidence as to what further training the individual defendants should have received. Likewise, the plaintiff has failed to adduce any evidence that such further training, whatever it might and/or should have been, would have prevented the alleged deprivation of the decedent's constitutional right to equal protectio,.i.e., "that (the0 specific deficiencies in the training the officer(s) received led to the ncident of alleged misconduct." Mariani v. City of Pittsburgh, 624 F.Supp. at 510. Thus, even assuming, without deciding, that the plaintiff's "inadequate training" theory stated a viable cause of action under Section 1983 against the City of Allentown, we find that the City is entitled to summary judgment as to this claim since the plaintiff has

failed to create a genuine issue of material fact both as to whether the individual defendants were, in fact, inadequately trained, and as to whether such alleged inadequate training caused his decedent's deprivation of her right to equal protection of the laws.

III. The Pendent State Law Claim.

Finally, we deny the individual defendants' summary judgment motion as to the plaintiff's pendent state law claim alleging that their actions constituted actual malice or willful misconduct. We believe that the Pennsylvania courts would recognize such a cause of action against the individual defendants if they did, in fact fail to provide the decedent the same amount of protection they would have accorded another person because of the decedent's sex or the nature of her complaint. Thus, it can be said that the plaintiff's state law claim is co-extensive with his Section 1983 denial of equal protection claim.

IV. Summary

In sum, we grant the defendants' motion for summary judgment as to the plaintiff's Section 1983 due process claim. We deny their motion as to the plaintiff's sections 1983 and 1985(3) equal protection claim, except insofar as the plaintiff's claim against the City of Allentown is premised upon the "inadequate training" theory. And finally, we deny the individual defendants' motion as to the Plaintiff's pendent state law claim.

An appropriate order follows.